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TABLE OF CASES REPORTED

IN THIS VOLUME.

PAGE

A.

Abercester, Ld., Lock *v.* – – 861
Agricultural Holdings Act, 1923, In re – – – – – 382
Alexander *v.* Gunther. In re Gunther's Will Trusts – – 985
Antofagasta (Chili) & Bolivia Ry. Co., Ld.'s, Trust Deed, In re. The Company *v.* Schröder – – – – 732
Antofagasta (Chili) & Bolivia Ry. Co. *v.* Schröder. In re Antofagasta (Chili) & Bolivia Ry. Co.'s Trust Deed – – 732
Armour *v.* Liverpool Corporation – – – – – 422
Assurance Companies Act, 1909, In re. *See* Prudential Assurance Co., Ld., In re.
Attorney-General *v.* Barnes Corporation and Ranelagh Club, Ld. – – – – 110
————, Brookes *v.* In re Hodson's Settlement (C. A.) 343
Attorney-General *v.* Finsbury Borough Council – – – 892
————, Poplett *v.* In re Payne's Declaration – 865
————, Skinner *v.* In re White – (C. A.) 131
————, Westminster Bank, Ld. *v.* – (C. A.) 610

B.

Barnes Corporation and Ranelagh Club, Ld., Attorney-General *v.* – – – – 110
Batchelar *v.* Evans – –1007
Beale (R. G. F.), In re. Ex parte The Board of Trade – – 761
Berton, In re. Vandyk *v.* Berton 200
———, Vandyk *v.* In re Berton 200
Bickersteth *v.* Dickinson. In re Dickinson's Settlements – 27
Board of Trade, Ex parte. In re Beale (R. G. F.) – – – 761
Bond *v.* Norman – – – 847

PAGE

Bond *v.* Nottingham Corporation – – – – – 847
Borders, Bradford Third Equitable Benefit Building Society *v.* – – – – – 520
Bradford Third Equitable Benefit Building Society *v.* Borders – – – – 520
Broadbent *v.* Macnab. In re Kay's Settlement – – 329
Brookes *v.* Attorney-General. In re Hodson's Settlement (C. A.) 343
Brooks' Settlement Trusts, In re. Lloyds Bank, Ld. *v.* Tillard – 993
Brown, Public Trustee *v.* In re Brown's Settlement – – 944
Brown's Settlement, In re. Public Trustee *v.* Brown – 944
Buchanan-Wollaston's Conveyance, In re. Curtis *v.* Buchanan-Wollaston 217, (C. A.) 738
Buchanan-Wollaston, Curtis *v.* In re Buchanan-Wollaston's Conveyance – 217, (C.A.) 738
Byrne, Few *v.* In re Maclennan (C. A.) 750
——, Knightsbridge Estates Trust, Ld. *v.* – (C. A.) 441

C.

Cable & Wireless, Ld. (No. 2), Haile Selassie *v.* – (C. A.) 182
Campbell-Stuart, Regier *v.* – 766
Carew, In re. Channer *v.* Francklyn – – – – 794
Cartwright, In re. Cartwright *v.* Smith – – (C. A.) 90
——— *v.* Smith. In re Cartwright – – (C. A.) 90
Cawston, Hassard-Short *v.* In re Cawston's Conveyance and The School Sites Act, 1841 – – – – – 784
Cawston's Conveyance and the School Sites Act, 1841, In re. Hassard-Short *v.* Cawston – 784

PAGE

Channer *v.* Francklyn. In re Carew – – – – 794
Cleadon Trust, Ld., In re (C.A.) 286
Cleasby *v.* Park Estate (Hughenden), Ld. In re Disraeli Agreement, etc. – – – 382
Coke *v.* Leicester (Earl of). In re Leicester's Settled Estates 77
Colin Cooper, In re. Le Neve-Foster *v.* National Provincial Bank – 580, (C. A.) 811
Coller *v.* Coller. In re Coller's Deed Trusts – (C. A.) 277
Coller's Deed Trusts, In re. Coller *v.* Coller – (C. A.) 277
Compton, West Ham Borough Council *v.* – – – – 771
Cooper (Colin), In re. Le Neve-Foster *v.* National Provincial Bank – 580, (C. A.) 811
Cowlishaw, In re. Cowlishaw *v.* Cowlishaw – – – 654
——— *v.* Cowlishaw. In re Cowlishaw – – – 654
Curtis *v.* Buchanan-Wollaston. In re Buchanan-Wollaston's Conveyance – 217, (C. A.) 738

D.

Daponte *v.* Schubert & Roy Nominees, Ld. – – – 958
Darby, In re. Russell *v.* MacGregor – – (C. A.) 905
Debtor, Ex parte *v.* Petitioning Creditors and the Official Receiver. In re Debtor [No. 382 of 1938] – (C. A.) 145
———, A, In re [No. 946 of 1926] – – (C. A.) 489
———, A, In re [No. 38 of 1938] 225
———, A, In re [No. 1035 of 1938] – – – – 594
———, A, In re [No. 382 of 1938]. Ex parte Debtor *v.* Petitioning Creditors and the Official Receiver – (C. A.) 145
———, A, In re [No. 441 of 1938] (C. A.) 251

PAGE

De Chassiron, In re. Lloyds Bank, Ld. *v.* Sharpe – – 934
Delgoffe *v.* Fader – – – 922
Dickinson, Bickersteth *v.* In re Dickinson's Settlements – 27
Dickinson's Settlements, In re. Bickersteth *v.* Dickinson – 27
Disraeli Agreement and the Agricultural Holdings Act, 1923, In re – – 382
Driver, Zetland (Marquess of) *v.* (C. A.) 1
Dulverton *v.* Macleod. In re Wills – – – – – 705

E.

Eaves, In re. Eaves *v.* Eaves –1000
Eaves *v.* Eaves. In re Eaves –1000
Edwards *v.* Taylor. In re Frame – – – – 700
Evans, Batchelar *v.* – –1007
Eves, In re. Midland Bank Executor & Trustee Co., Ld. *v.* Eves – – – – 969
——, Midland Bank Executor & Trustee Co., Ld. *v.* In re Eves – – – – – 969

F.

Fader, Delgoffe *v.* – – – 922
Fahland, Norbury *v.* In re Norbury – – – – 528
Farmer, In re. Nightingale *v.* Whybrow – – – – 573
Few *v.* Byrne. Maclennan, In re – – – (C. A.) 750
Finch *v.* Martin. In re Jefferys 205
Finsbury Borough Council, Attorney-General *v.* – – 892
Fletcher, Public Trustee *v.* In re Warren – – – – 684
Forster, In re. Gellatly *v.* Palmer – – – – 22
Frame, In re. Edwards *v.* Taylor – – – – 700
Francklyn, Channer *v.* In re Carew – – – – 794

PAGE

G.

Gatti *v.* Shoosmith – (C. A.) 841
Gellatly *v.* Palmer. In re Forster – – – – 22
Giorgi *v.* Navani. In re Landi (C. A.) 828
Gorham's Charity Gift, In re. In re the Mortmain and Charitable Uses Act, 1891 – – 410
Gullick, Sharpe & Fox *v.* In re Sharpe's Deed of Release – 51
Gunther, Alexander *v.* In re Gunther's Will Trusts – – 985
Gunther's Will Trusts, In re. Alexander *v.* Gunther – – 985

H.

Hadfields, Ld., Noble Lowndes & Partners (a Firm) *v.* – 569
Haile Selassie *v.* Cable & Wireless, Ld. (No. 2) – (C. A.) 182
Hassard-Short *v.* Cawston. In re Cawston's Conveyance and the School Sites Act, 1841 – 784
Hemsley, Jennings *v.* In re Lewis – – – – 232
Hobson *v.* McEacharn. In re McEacharn's Settlement Trusts – – – – 858
Hodson's Settlement, In re. Brookes *v.* Attorney-General (C. A.) 343
Hudgell, National Electric Theatres, Ld. *v.* – – – 553

I.

Industrial Assurance Act, 1923, In re. *See* Prudential Assurance Co., Ld., In re.

J.

Jackson, Wolson *v.* In re Wolson – – – – – 780
Jefferys, In re. Finch *v.* Martin 205
Jennings *v.* Hemsley. In re Lewis– – – – 232

PAGE

Judgment Debtor, In re [No. 2176 of 1938] – (C. A.) 601

K.

Kay's Settlement, In re. Broadbent *v.* Macnab – – 329
Knightsbridge Estates Trust, Ld. *v.* Byrne – (C. A.) 441

L.

Landi, In re. Giorgi *v.* Navani (C. A.) 828
Lawrence *v.* South County Freeholds, Ld. – – – – 656
Leicester (Earl of), Coke *v.* In re Leicester's Settled Estates 77
Leicester's Settled Estates, In re. Coke *v.* Leicester (Earl of) – – – – – – 77
Le Neve-Foster *v.* National Provincial Bank. In re Colin Cooper – 580, (C. A.) 811
Lewis, In re. Jennings *v.* Hemsley – – – – 232
Liverpool Corporation, Armour *v.* – – – – – 422
Lloyds Bank, Ld. *v.* Marsland, In re Marsland – (C. A.) 820
——— *v.* Sharpe. In re De Chassiron – – – 934
——— *v.* Tillard. In re Brooks' Settlement Trusts 993
Lock *v.* Abercester, Ld. – – 861
London General Insurance Co., Ld., In re – – – – 505

M.

McEacharn, Hobson *v.* In re McEacharn's Settlement Trusts – – – – 858
McEacharn's Settlement Trusts, In re. Hobson *v.* McEacharn 858
MacGregor, Russell *v.* In re Darby – – (C. A.) 905

PAGE

Maclennan, In re. Few *v.* Byrne (C. A.) 750
Macleod, Dulverton *v.* In re Wills – – – – – 705
Macnab, Broadbent *v.* In re Kay's Settlement – – 329
Marsland, In re. Lloyds Bank, Ld. *v.* Marsland – (C. A.) 820
———, Lloyds Bank, Ld. *v.* In re Marsland – (C. A.) 820
Martin, Finch *v.* In re Jefferys 205
Maville Hose, Ld., In re – – 32
Midland Bank Executor & Trustee Co., Ld. *v.* Eves. In re Eves – – – – 969
Molony *v.* Nicholson. In re Nicholson's Settlement (C.A.) 11
Morgan, Transport & General Credit Corporation, Ld. *v.* – 531
Mortmain and Charitable Uses Act, 1891, In re. In re Gorham's Charity Gift – – 410
Moseley (David) & Sons, Ld., In re – – – – – 719
Muscovitch, In re. Ex parte Muscovitch – (C. A.) 694

N.

National Electric Theatres, Ld. *v.* Hudgell – – – – 553
National Provincial Bank, Le Neve-Foster *v.* In re Colin Cooper – – 580, (C. A.) 811
Navani, Giorgi *v.* In re Landi (C. A.) 828
Nicholson, Molony *v.* In re Nicholson's Settlement (C. A.) 11
——— *v.* Vaux. In re Vaux (C. A.) 465
Nicholson's Settlement, In re. Molony *v.* Nicholson (C. A.) 11
Nightingale *v.* Whybrow. In re Farmer – – – – 573
Noble Lowndes & Partners (a Firm) *v.* Hadfields, Ld. – 569

PAGE

Norbury, In re. Norbury *v.* Fahland – – – – 528
——— *v.* Fahland. In re Norbury – – – – 528
Norman, Bond *v.* – – – 847
North Bucks Furniture Depositories, In re – – – – 690
North, Taylor *v.* In re Sanger 238
Nottingham Corporation, Bond *v.* – – – – – 847

O.

Oceanic Steam Navigation Co., Ld., In re – – – – 41
Official Receiver, Ex parte Debtor *v.* In re Debtor [No. 382 of 1938] – (C. A.) 145

P.

Palmer, Gellatly *v.* In re Forster – – – – 22
Park Estate (Hughenden), Ld., Cleasby *v.* In re Disraeli Agreement, etc. – – – 382
Payne, In re. Poplett *v.* Attorney-General – – 865
Payne's Declaration, In re. Poplett *v.* Attorney-General 865
Poplett *v.* Attorney-General. In re Payne's Declaration – 865
Prudential Assurance Co., Ld., and The Assurance Companies Act, 1909, and The Industrial Assurance Act, 1923, In re – 878
Public Trustee *v.* Brown. In re Brown's Settlement – – 944
——— *v.* Fletcher. In re Warren – – – – 684
——— *v.* Walker. In re Walker – – – – 974

Q.

Queen Anne's Bounty *v.* Tithe Redemption Commission (C. A.) 155

PAGE

R.

Regier *v.* Campbell-Stuart – 766
Russell *v.* MacGregor. In re Darby – – (C. A.) 905

S.

Sanger, In re. Taylor *v.* North 238
Schröder, The Company *v.* In re Antofagasta (Chili) & Bolivia Ry. Co., Ld's., Trust Deed – – – – – 732
Schubert & Roy Nominees, Ld., Daponte *v.* – – – 958
Sharpe, Lloyds Bank, Ld. *v.* In re De Chassiron – – – 934
——— *v.* Tophams, Ld. (C.A.) 373
——— & Fox *v.* Gullick. In re Sharpe's Deed of Release 51
Sharpes' Deed of Release, In re. Sharpe & Fox *v.* Gullick – 51
Shenton *v.* Tyler 271, (C. A.) 620
Shoosmith, Gatti *v.* (C. A.) 841
Skinner *v.* Attorney-General. In re White – (C. A.) 131
Smith, Cartwright *v.* In re Cartwright – – (C. A.) 90
Smithers, In re. Watts *v.* Smithers – – – –1015
———, Watts *v.* In re Smithers – – – –1015
South County Freeholds, Ld., Lawrence *v.* – – – 656
Superma, Ld., & Sartory *v.* Tenconi – – – – 724

T.

Taylor, Edwards *v.* In re Frame – – – – 700
——— *v.* North. In re Sanger 238
Tenconi, Superma, Ld., & Sartory *v.* – – – – 724
Thomas (John), In re – – 513
Tillard, Lloyds Bank, Ld. *v.* In re Brooks' Settlement Trusts 993

PAGE

Tithe Redemption Commission, Queen Anne's Bounty *v.* (C. A.) 155
Topham's, Ld., Sharpe *v.* (C.A.) 373
Townsend, Wallington *v.* – 588
T. R. M., In re – – – 260
Transport & General Credit Corporation, Ld. *v.* Morgan – 531
Tyler, Shenton *v.* 271, (C. A.) 620

V.

Vandyk *v.* Berton. In re Berton 200
Vaux, In re. Nicholson *v.* Vaux (C. A.) 465
——, Nicholson *v.* In re Vaux (C. A.) 465

W.

Walker, In re. Public Trustee *v.* Walker – – – – 974
———, Public Trustee *v.* In re Walker – – – – 974
Wallington *v.* Townsend – – 588

PAGE

Warren, In re. Public Trustee *v.* Fletcher – – – – 684
Watts *v.* Smithers. In re Smithers – – – – –1015
West Ham Borough Council, Compton *v.*– – – – 771
Westhoughton Coal & Cannel Co., Ld. *v.* Wigan Coal Corporation, Ld. 393, (C. A.) 800
Westminster Bank, Ld. *v.* Attorney-General (C. A.) 610
White, In re. Skinner *v.* Attorney-General (C.A.) 131
Whybrow, Nightingale *v.* In re Farmer – – – – 573
Wigan Coal Corporation, Ld., Westhoughton Coal & Cannel Co., Ld. *v.* – 393, (C. A.) 800
Wills, In re. Dulverton *v.* Macleod – – – – – 705
Wolson, In re. Wolson *v.* Jackson – – – – 780
——— *v.* Jackson. In re Wolson – – – – 780

Z.

Zetland (Marquess of) *v.* Driver (C. A.) 1

TABLE OF CASES CITED.

A.

		PAGE
Adamson *v.* Att.-Gen.	[1933] A. C. 257	343, 869
Airdale Co-Operative Worsted Manufacturing Society, Ld., In re	[1933] Ch. 639	293
Aksionairnoye Obschestvo A. M. Luther *v.* Sagor (James) & Co.	[1921] 3 K. B. 532	185, 189
Alefounder's Will Trusts, In re	[1927] 1 Ch. 360	516
Allen *v.* Jackson	1 Ch. D. 399	822
Allhusen *v.* Whittell	L. R. 4 Eq. 295	906
Amos, In re	[1891] 3 Ch. 159	24
Ancona *v.* Waddell	10 Ch. D. 157	975
Andrewes *v.* George	3 Sim. 393	713
Andrews, In re	[1902] 2 Ch. 394	924
Anglo-Continental Supply Co., Ld., In re	[1922] 2 Ch. 723	45
Anonymous	1 Raym. 480	160
Arden & Rutter's Arbitration, In re	[1923] 2 K.B. 865	387
Arkwright *v.* Newbold	17 Ch. D. 301	767
Ashbury Railway Carriage Co. *v.* Riche	L. R. 7 H. L. 653	45
Ashforth, In re	[1905] 1 Ch. 535	449
Assunta, The	[1902] P. 150	570
Astor, In re	[1922] 1 Ch. 364	52
Atkinson, In re	[1930] 1 Ch. 47	240
Att.-Gen. *v.* Adamson	[1932] 2 K. B. 159	353
—— *v.* De Préville	[1900] 1 Q. B. 223	869
—— *v.* Dickinson & Baron	[1937] 2 K. B. 574	343
—— *v.* Fulham Corporation	[1921] 1 Ch. 441	432, 433
—— *v.* Great Eastern Ry. Co.	5 App. Cas. 473	432
—— *v.* Hodgson	[1922] 2 Ch. 429	862
—— *v.* Horner	14 Q. B. D. 245	853
—— *v.* Johnson	[1907] 2 K. B. 885	131
—— *v.* Lloyds Bank, Ld.	151 L. T. 268; [1935] A. C. 382	343, 346
—— *v.* Milne	[1914] A. C. 765	347, 872
—— *v.* Pearson	[1924] 2 K. B. 375	353
—— *v.* Quixley	141 L. T. 288	353
—— *v.* Robinson	[1901] 2 I. R. 67	354
—— *v.* Smethwick Corporation	[1932] 1 Ch. 562	432
—— *v.* Watson	[1917] 2 K. B. 427	131
—— for Ontario *v.* National Trust Co., Ld.	[1931] A. C. 818	870
Attwood *v.* Gibbons	(Unreported 1927 A. 344)	958
Automobile & General Finance Corporation *v.* Morris	73 Sol. Jo. 451	538
Aveson *v.* Kinnaird (Lord)	6 East, 188	625
Aylesford (Earl) *v.* Morris	L. R. 8 Ch. 484	447

B.

Babcock & Wilcox, Ld. *v.* Water Tube Boiler & Engineering Co.	27 R. P. C. 626	725
Bain *v.* Fothergill	L. R. 7 H. L. 158	590
Baird *v.* Williamson	15 C. B. (N. S.) 376	393
Baker, In re. Baker *v.* Baker	[1904] 1 Ch. 157	1002
—— *v.* Faber	[1908] W. N. 9	842
—— *v.* White	2 Vern. 215	822
Baldwin *v.* Roche	5 Ir. Eq. R. 110	17
Ballard's Conveyance, In re	[1937] Ch. 473	2

		PAGE
Banco de Bilbao *v.* Sancha	[1938] 2 K. B. 176	192
Banco de Vizcaya *v.* Don Alfonso de Burbon y Austria	[1935] 1 K. B. 40	184
Bank of Ethiopia *v.* National Bank of Egypt & Liguori	[1937] Ch. 513	184
Bankruptcy Notice, A, In re	[1898] 1 Q. B. 383	602
Bannatyne *v.* MacIver (D. & C.)	[1906] 1 K. B. 103	286
Banque Russe et Française *v.* Clark	[1894] W. N. 203	252
Barker *v.* Dixie	Cases t. Hardwicke, 264	626
Barnado's (Dr.) Homes National Incorporated Association *v.* Commissioners for Special Purposes of the Income Tax Acts	[1921] 2 A. C. 1	989
Barry *v.* Forster-Brown. In re Forster-Brown	[1914] 2 Ch. 584	988
Bartholomew *v.* Menzies. In re Weston	[1902] 1 Ch. 680	922, 930
Beak's Estate, In re	L. R. 13 Eq. 489	924
Belvedere Fish Guano Co. *v.* Rainham Chemical Works, Ld.	[1920] 2 K. B. 487	804
Beveridge *v.* Minter	1 Car. & P. 435	622
Biggs *v.* Hoddinott	[1898] 2 Ch. 307	445
Blackmore *v.* White	[1899] 1 Q. B. 293	910
Blackwell *v.* Blackwell	[1929] A. C. 318	580, 622, 811
Blatchford *v.* Cory & Grundy, Ld.	38 R. P. C. 412	725
Blow, In re	[1914] 1 Ch. 233	234
Bonnard *v.* Dott	[1906] 1 Ch. 740	538
Bottle, In re	(Unreported)	414
Bovill *v.* Endle	[1896] 1 Ch. 648	444
Bower *v.* Peate	1 Q. B. D. 321	850
Bradford Corporation *v.* Myers	[1916] 1 A. C. 242	774
Bradley *v.* Carritt	[1903] A. C. 253	445
Bradshaw *v.* Turner. In re Tod	[1916] 1 Ch. 567	989
Braybrooke *v.* Att.-Gen.	9 H. L. C. 150	870
Brigg *v.* Thornton	[1904] 1 Ch. 386	6
Brindley, In re. Ex parte Taylor, Sons & Co.	[1906] 1 K. B. 377	145
British, Foreign & Colonial Automatic Light Controlling Co., Ld. *v.* Metropolitan Gas Meters, Ld.	29 R. P. C. 303	730
Broad *v.* Bevan	1 Russ. 511*n*	702
Brooker, In re. Brooker *v.* Brooker	[1926] W. N. 93	200
Brooks (J. B.) & Co., Ld. *v.* Lycett (E.) Ld.	20 R. P. C. 390	725
Brown, Ex parte	L. R. 9 Ch. 304	494
——— *v.* Cole	14 Sim. 427	444
Buck, In re	[1896] 2 Ch. 727	24
Burke, In re	[1908] 2 Ch. 248	687
Burrell & Kinnaird *v.* Att.-Gen.	[1937] A. C. 286	348

C.

Carlill *v.* Carbolic Smoke Ball Co., Ld.	[1893] 1 Q. B. 256	433
Cathcart *v.* Chalmers	[1911] A. C. 246	386
Cavendish Browne's Settlement Trusts, In re	[1916] W. N. 341 ; 61 Sol. Jo. 27	333
Chadwick-Healey *v.* Crawford. In re Nicholson	[1938] 3 All E. R. 270	573, 794, 934
Chambers, In re	(1847) 11 Ir. Eq. Rep. 518	946
——— *v.* Randall	[1923] 1 Ch. 149	5
Chandler *v.* Pocock	16 Ch. D. 648	93
Chaplin, In re	[1933] Ch. 115	23

		PAGE
Chapman *v.* Gibson	3 Bro. C. C. 229	786
——— *v.* Michaelson	[1909] 1 Ch. 238	542
Chesterfield's (Earl) Trusts, In re	24 Ch. D. 643	911
Child *v.* Douglas	Kay, 560; 5 D. M. & G. 739	5, 669
Churcher *v.* Martin	42 Ch. D. 312	787
Clabbon, In re	[1904] 2 Ch. 465	262
Clarke *v.* Lewisham District Council	19 Times L. R. 62	773
Clark's Trust, In re	1 Ch. D. 497	22
Clayton's Case	1 Mer. 572	545
Clerke *v.* Menzies. In re Wombwell's Settlement	[1922] 2 Ch. 298	1001
Cleveland's (Duke of) Settled Estates, In re	[1893] 3 Ch. 244	94
Cole *v.* Wade	16 Ves 27	469
Coles & Ravenshear, In re	[1907] 1 K. B. 1	842
Collyer *v.* Isaacs	19 Ch. D. 342	354
Colyear *v.* Mulgrave (Countess of)	2 Keen, 81	335
Conolly Bros., Ld., In re (No. 2)	[1912] 2 Ch. 25	541
Cood *v.* Cood & Pollard	10 Pr. 109	539
Cooke, In re. Randall *v.* Cooke	[1916] 1 Ch. 480	709, 988
Corbett *v.* Inland Revenue Commissioners	[1938] 1 K. B. 567	989
Corea *v.* Appuhamy	[1912] A. C. 230	831
Cork & Youghal Ry. Co., In re	L. R. 4 Ch. 748	293
Cotter *v.* Layer	2 P. Wms. 623	786
Cottrell, In re	[1910] 1 Ch. 402	934
Cowdry *v.* Day	1 Giff. 316	445
Cowley (Earl) *v.* Inland Revenue Commissioners	[1899] A. C. 198	347
Cox, In re	[1938] Ch. 556	934
—— *v.* Barnard	8 Hare, 310	334
Craven, In re. Watson *v.* Craven	[1914] 1 Ch. 358	709, 988
Crawshay, In re	43 Ch. D. 615	16
Crawter *v.* Marvin. In re Marvin	[1905] 2 Ch. 490	1009
Crispin *v.* Hadden. In re Hutchinson	88 L. J. (Ch.) 352	1017, 1019
Crompton *v.* Lea	L. R. 19 Eq. 115	401
Crowther *v.* Appleby	L. R. 9 C. P. 23	36
Cugny's Will Trusts, In re	[1931] 1 Ch. 305	513
Cullerne *v.* London & Suburban General Permanent Building Society	25 Q. B. D. 485	525
Cunnack *v.* Edwards	[1896] 2 Ch. 679	24
Cusack *v.* Day	[1925] 3 D. L. R. 1028	924
Cyclists' Touring Club *v.* Hopkinson	[1910] 1 Ch. 179	431

D.

Da Costa, In re	[1912] 1 Ch. 337	449
D'Angibau, In re	15 Ch. D. 228	332
Daniel, In re	[1917] 2 Ch. 405	588
Daubeny *v.* Cockburn	1 Mer. 626	15
D'Auvergne *v.* Cooper	[1899] W. N. 256	958
Davies *v.* Huguenin	1 H. & M. 730	953
——— *v.* Thomas	[1900] 2 Ch. 462	539
Davis *v.* Dinwoody	4 T. R. 678	626
——— *v.* Garrett	6 Bing. 716	401
——— *v.* Symons	[1934] Ch. 442	445
Dawkins *v.* Antrobus	17 Ch. D. 615	6
Debtor, In re	[1903] 1 K. B. 705	447
——— (No. 1088 of 1923), A, In re	[1924] B. & C. R. 1	495

		PAGE
Debtor, In re	[1936] Ch. 165	145
Dennis *v.* Malcolm	[1934] Ch. 244	784
Descombes & Arondel *v.* Lestor & Parton	48 R. P. C. 473	726
de Sommery, In re	[1912] 2 Ch. 622	469
De Trafford *v.* Att.-Gen.	[1935] A. C. 280	348
Digges's Case	Mo. 603	946
Dillon, In re	44 Ch. D. 76	922
Dixon *v.* Rackham	Unreported (1913, D. 179)	787
Dodson *v.* Sammell	1 Dr. & Sm. 575	235
Dodworth *v.* Dale	[1936] 2 K. B. 503	1002
Doe *v.* Bevan	3 M. & S. 353	827
—— d. Gardner *v.* Kennard	12 Q. B. 244	387
Doker *v.* Hasler	Ry. & Moo. 198	272, 622
Drake *v.* Gray	[1936] Ch. 451	5
Dublin City Distillery, Ld. *v.* Doherty	[1914] A. C. 823	539
Duckworth *v.* Lee	[1899] 1 I. R. 405	924
Duff Development Co., Ld. *v.* Kelantan Government	[1924] A. C. 797	184
Duffield *v.* Elwes	1 Bli. N. S. 497	923

E.

Eason *v.* Henderson	12 Q. B. 986	830
East Fremantle Corporation *v.* Annois	[1902] A. C. 213	852
Eccles & Co. *v.* Louisville & Nashville Railroad Co.	[1912] 1 K. B. 135	36
Edwards *v.* Porter	[1925] A. C. 1	625
Ellenborough, In re. Towry Law *v.* Burne	[1903] 1 Ch. 697	332, 993
Ellison *v.* Ellison	6 Ves. 656	334
Elliston *v.* Reacher	[1908] 2 Ch. 374, 665	666
Emerson, In re	[1929] 1 Ch. 128	1017
Emma Silver Mining, In re	L. R. 10 Ch. 194	36
Empire Guarantee & Insurance Corporation, Ld.	1911 S. C. 1296	882
Engell *v.* Fitch	L. R. 4 Q. B. 659	590
Esberger *v.* Capital & Counties Bank	[1913] 2 Ch. 366	532
Erving *v.* Peters	3 T. R. 685	1010
Etheridge *v.* Womersley. In re Womersley	29 Ch. D. 557	1009
Evans, In re	[1920] 2 Ch. 304	976
Evered, In re	[1910] 2 Ch. 147	944
Ewing (William), In the Goods of	6 P. D. 19	136
Exall *v.* Partridge	8 T. R. 308	315

F.

Fairclough *v.* Swan Brewery Co.	[1912] A. C. 565	445
Falcke *v.* Scottish Imperial Insurance Co.	34 Ch. D. 234	294
Farmer, In re	[1938] W. N. 411	794
——— In re	[1939] Ch. 573	934
Favorke *v.* Steinkopff	[1922] 1 Ch. 174	137
Featherstonhaugh *v.* Lee Moor Porcelain Clay Co.	L. R. 1 Eq. 318	44
Fender *v.* St. John Mildmay	[1938] A. C. 1	823
Field, In re	[1925] Ch. 636	910

		PAGE
Flavell, In re	25 Ch. D. 89	335
Fletcher *v.* Fletcher	4 Hare, 67	334
Flint, In re. Flint *v.* Flint	[1927] 1 Ch. 570	208, 741
Flureau *v.* Thornhill	2 W. Bl. 1078	590
Footner *v.* Sturgis	5 De G. & Sm. 736	959
Ford *v.* Wastell	6 Hare, 229; 2 Ph. 591	959
Forder, In re	[1927] 2 Ch. 291	975
Forsey & Hollebone's Contract, In re	[1927] 2 Ch. 379	121
Forster-Brown, In re. Barry *v.* Forster-Brown	[1914] 2 Ch. 584	709, 988
Fortescue *v.* Barnett	3 My. & K. 36	334
Fortescue's Estate, In re	[1916] 1 I. R. 268	445
Foster *v.* Smith	1 Ph. 629	279
Fowke *v.* Fowke	[1938] Ch. 774	1001
Frost, In re	43 Ch. D. 246	449

G.

Galbraith *v.* Grimshaw & Baxter	[1910] 1 K. B. 339	602
Gandy *v.* Gandy	30 Ch. D. 57	333
Gardner (Doe d.) *v.* Kennard	12 Q. B. 244	387
Geddis *v.* Bann Reservoir Proprietors	3 App. Cas. 430	849
Gilbert, In re	[1908] W. N. 63	709
Glasgow Assurance Corporation Liquidators *v.* Welsh Insurance Corporation	1914 S. C. 320	507
Gleadow *v.* Leetham	22 Ch. D. 269	654
Glegg *v.* Bromley	[1912] 3 K. B. 474	353
Gluckstein *v.* Barnes	[1900] A. C. 240	767
Gold Co., In re	12 Ch. D. 77	34
Gold, In re	8 Morr. 45	495
Goldsmiths' Co. *v.* West Metropolitan Ry. Co.	[1904] 1 K. B. 1	155
Gosling, In re	[1900] W. N. 15; 48 W. R. 300	24
Grassi, In re	[1905] 1 Ch. 584	93
Great Kruger Gold Mining Co., Ld., In re	[1892] 3 Ch. 307	34
Green *v.* Green	2 Jo. & Lat. 529	946
Greenberg *v.* Cooperstein	[1926] 1 Ch. 657	432
Guardian Assurance Co., In re	[1917] 1 Ch. 431	45

H.

Haile Selassie *v.* Cable & Wireless, Ld.	[1938] Ch. 545	183
Halifax & Huddersfield Union Banking Co. *v.* Radcliffe, Ld.	[1895] W. N. 63	962
Harbin *v.* Masterman	[1896] 1 Ch. 351	284
Hargreaves, In re	43 Ch. D. 401	472
———, In re. Hargreaves *v.* Hargreaves	86 L. T. 43; 88 L. T. 100	706, 988
Harman, In re	[1934] A. C. 245	495
Harrison, In re	43 Ch. D. 55	909
Hart, In re. Hart *v.* Arnold	107 L. T. 757	709, 988
—— *v.* Arnold. In re Hart	107 L. T. 757	988
Hartley *v.* Rice	10 East, 22	822
Haywood *v.* Brunswick Permanent Benefit Building Society	8 Q. B. D. 403	668

		PAGE
Hearts of Oak Assurance Co., Ld., In re	[1936] Ch. 558	507
Heath *v.* Nugent	29 Beav. 226	940
Henderson *v.* Bank of Australasia	40 Ch. D. 170	430
——— *v.* Henderson's Trustees	1900 37 Sc. L. R. 976	859
Hewett, In re	[1918] 1 Ch. 458	823
Hickley *v.* Kingcome. In re Kingcome	[1936] Ch. 566	969
Hodson's Settlement, In re	[1939] Ch. 343	611, 865
Hollis' Hospital (Trustees of) & Hague's Contract, In re	[1899] 2 Ch. 540	449
Holroyd *v.* Marshall	10 H. L. C. 191	354, 542
Hone's Estate, In re	Ir. R. 8 Eq. 65	445
Hosack *v.* Robins	[1917] 1 Ch. 142, 332	958
Hotchkys, In re	32 Ch. D. 408	83
House, In re. Westminster Bank *v.* Everett	[1929] 2 Ch. 166	201
Howe *v.* Dartmouth (Earl)	7 Ves. 137	200
Hughes *v.* Pump House Hotel Co., Ld. (No. 2)	[1902] 2 K. B. 485	570
Hurdman *v.* North Eastern Ry. Co.	3 C. P. D. 168	803
Hurst *v.* Hurst	16 Beav. 372	955
Hutchinson, In re. Crispin *v.* Hadden	88 L. J. (Ch.) 352	1017, 1019
Hutton *v.* West Cork Ry. Co.	23 Ch. D. 654	430
Hyman *v.* Elandslaagte Collieries, Ld.	42 Natal L. R. 43	376

I.

Inglefield (George) & Co., Ld., In re	[1933] 1 Ch. 1	538
Inverclyde *v.* Inverclyde	[1931] P. 29	1001
Isabel Joanna James, In re	[1932] 2 Ch. 25	24
Ives *v.* Brown	[1919] 2 Ch. 314	5
Ivy's, Lady, Case	10 St. Tr. 628	638

J.

James, Isabel Joanna, In re	[1932] 2 Ch. 25	24
Jay *v.* Jay	[1924] 1. K. B. 826	910
Jeanes, In re	Unreported	203
Jenner *v.* Morris	3 De G. F. & J. 45	306
Jennings *v.* Ward	2 Vern. 520	445
Jervis *v.* Wolferstan	L. R. 18 Eq. 18	1001
Johnson, In re	92 L. T. 357	924
——— *v.* Edgware, etc., Ry. Co.	35 Beav. 480	389
Jolly, In re	[1900] 2 Ch. 616	830
Jones, In re. Jones *v.* Jones	[1933] Ch. 842	750, 970
——— *v.* Bailey	17 Beav. 582	960
——— *v.* Jones. In re Jones	[1933] Ch. 842	750, 970
——— *v.* Pritchard	[1908] 1 Ch. 630	849

K.

Kearsley *v.* Philips	10 Q. B. D. 36	36
Keates *v.* Lyon	L. R. 4 Ch. 218	5
Kekewich *v.* Manning	1 De G. M. & G. 176	998
Kelly *v.* Barrett	[1924] 2 Ch. 379	667

		PAGE
Kempthorne, In re	[1930] 1 Ch. 268	98, 238
Kennard *v.* Futvoye	29 L. J. (Ch.) 553	960
Kennedy *v.* De Trafford	[1896] 1 Ch. 762; [1897] A.C. 180	831
Kent *v.* Pickering	5 Sim. 569	1009
Kevorkian *v.* Burney	[1937] W. N. 345	842
Key *v.* Bradshaw	2 Vern. 102	823
Kimber *v.* Barber	L. R. 8 Ch. 56	768
King, In re	[1907] 1 Ch. 72	234
—— *v.* Dickeson	40 Ch. D. 596	657
Kingcome, In re. Hickley *v.* Kingcome	[1936] Ch. 566	969
Kirk, In re	11 Ch. D. 431	702
Knight *v.* Briggs. In re White	[1925] Ch. 179	814
——— *v.* Simmonds	[1896] 1 Ch. 653	657
Kreglenger (G. & C.) *v.* New Patagonia Meat & Cold Storage Co.	[1914] A. C. 25	444

L.

Labouchere *v.* Warncliffe (Earl of)	13 Ch. D. 346	6
Lacon, In re	[1891] 2 Ch. 482	477
Lagan Navigation Co. *v.* Lambeg Bleaching, Dyeing & Finishing Co.	[1927] A. C. 226	852
Lamb, Ex parte	19 Ch. D. 169	695
———, In re	[1894] 2 Q. B. 805	763
———, In re	[1929] 1 Ch. 722	238
Lambert *v.* Woolworth (F. W.) & Co., Ld.	[1938] Ch. 883	555
Landon *v.* Poyser. In re Poyser	[1908] 1 Ch. 828	988
Lanyon, In re	[1927] 2 Ch. 264	823
Lassence *v.* Tierney	1 Mac & G. 551	347
Lawley, In re	[1911] 2 Ch. 530	235
Lane *v.* Page	1 Amb. 233	15
Leaver, Ex parte	51 L. T. 817	35
Lee, In re	[1918] 2 Ch. 320	924
Lee Behrens & Co., Ld., In re	[1932] 2 Ch. 46	431
Lees *v.* Nuttall	1 Russ.& M. 53; 2 My. & K. 819	768
Le Fevre *v.* Pettit. In re Pettit	[1922] 2 Ch. 765	750, 969
Leggott *v.* Western	12 Q. B. D. 287	960
Leigh *v.* Dickeson	15 Q. B. D. 60	302
Leigh's Settled Estates, In re	[1926] Ch. 852	52
——————— (No .2)	[1927] 2 Ch. 13	52
Leonard *v.* Simpson	2 Bing. N. C. 176	1007
Lester *v.* Garland	15 Ves. 248	172
Lethbridge *v.* Thurlow	15 Beav. 334	654
Lewis *v.* Baker	[1906] 2 K. B. 599	385
Liddy *v.* Kennedy	L. R. 5 H. L. 134	387
Liggett (B.) (Liverpool), Ld. *v.* Barclays Bank, Ld.	[1928] 1 K. B. 48	293
Litchfield *v.* Dreyfus	[1906] 1 K. B. 584	538
Little, In re	40 Ch. D. 418	951
Littlejohn *v.* London County Council	[1938] 1 K. B. 78	773
Liverpool Corporation *v.* Hope	[1938] 1 K. B. 751	691
Lloyds Bank, Ld. *v.* Chartered Bank of India, Australia & China	[1929] 1 K. B. 40	328
Lockwood & Elliott, Ld. *v.* Cardwell, Ld.	(Unreported)	400
Lodge *v.* National Union Investment Co., Ld.	[1907] 1 Ch. 300	446, 542
Lomax *v.* Stott	39 L. J. (Ch.) 834	401

		PAGE
London, Brighton & South Coast Railway Co., In re. Ex parte Wilkinson	3 De G. & Sm. 633	279
London County Council *v.* Allen	[1914] 3 K. B. 642	6
London & Lancashire Paper Mills Co., Ld., In re	57 L. J. (Ch.) 766	34
London & South Western Ry. Co. *v.* Gomm	20 Ch. D. 562	6, 449
Lonsdale (Earl of) *v.* Lowther	[1900] 2 Ch. 687	208
Loveless, In re	[1918] 2 Ch. 1	655
Lovett *v.* Lovett	[1898] 1 Ch. 82	993
Low *v.* Innes	4 De G. J. & S. 286	6
Lowe *v.* Peers	4 Burr. 2225	823
Lucan (Earl of), In re	45 Ch. D. 470	334
Lucas, In re	[1922] 2 Ch. 52	23
Luther (James) *v.* Sagor	[1921] 3 K. B. 532	185, 189
Lyne's Settlement Trusts, In re	[1919] 1 Ch. 80	93
Lyon, Ex parte	45 L. T. 768	695

M.

McCormick *v.* Grogan	L. R. 4 H. L. 82	622
M'Gonnell *v.* Murray	(1868) I. R. 3 Eq. 460	924
McGrath's Decision, In re	[1934] 2 K. B. 415	432
Mackreth *v.* Symmons	15 Ves. 329	541
McLaren *v.* Public Trustee. In re Robinson	[1911] 1 Ch. 502	1001
McManus *v.* Bowes	[1938] 1 K. B. 98	774
Maire, In re	49 Sol. Jo. 383	689
Mansel, In re. Smith *v.* Mansel	[1930] 1 Ch. 352	706, 988
Mardon, In re	[1896] 1 Q. B. 140	763
Markham *v.* Derby Corporation	[1935] Ch. 320	121
Marlborough's (Duke of) Settlement, In re	32 Ch. D. 1	94
Marrison *v.* Bell	[1939] 2 K. B. 187	776
Marsden's Trust, In re	4 Drew, 594	16
Marvin, In re. Crawter *v.* Marvin	[1905] 2 Ch. 490	1009
Massey *v.* Allen	9 Ch. D. 164	35
Master *v.* Hansard	4 Ch. D. 718	5
May, Ex parte	12 Q. B. D. 497	494
Meek *v.* Devenish	6 Ch. D. 566	98
—— *v.* Kettlewell	1 Hare, 464; 1 Phill. 342	332, 998
Mellor, In re	[1929] 1 Ch. 446	1017
Messer *v.* Boyle	21 Beav. 559	960
Meux *v.* Jacobs	L. R. 7 H. L. 481	881
Monckton's Settlement, In re	[1913] 2 Ch. 636	93
Monro *v.* Twopeny. In re Twopeny's Settlement	[1924] 1 Ch. 522	94
Monroe *v.* Twisleton	Peake's Add. Cas. 219	273, 622
Moore, In re	[1901] 1 Ch. 936	470
——— *v.* Darton	4 De G. & Sm. 517	929
Morgan *v.* Davey	Cab. & El. 114	450
——— *v.* Jeffreys	[1910] 1 Ch. 620	445
Morrice *v.* Aylmer	L. R. 10 Ch. 148	859
Muffett, In re	39 Ch. D. 534	912

N.

National Standard Life Assurance Corporation, In re	[1917] 1 Ch. 193	507
Neave, In re	[1938] Ch. 793	469
Neville, In re	[1925] Ch. 44	1016, 1017

		PAGE
New London & Suburban Omnibus Co., Ld., In re	[1908] 1 Ch. 621	539
Newbegin's Estate, In re	36 Ch. D. 477	263
Newbould *v.* Attorney-General	[1931] P. 75	1001
Newman *v.* Oughton	[1911] 1 K. B. 793	538
Newton *v.* Marsden	2 J. & H. 356	823
——— *v.* Pyke	[1908] 25 T. L. R. 127	538
Niblett *v.* Midland Ry. Co.	96 L. T. 462	276
Nicholson, In re. Chadwych-Healey *v.* Crawford	[1938] 3 All E. R. 270	573, 794, 934
Nixon, In re	[1904] 1 Ch. 638	234
Noakes & Co. *v.* Rice	[1902] A. C. 24	448
Nordberg (J. A.), Ld., In re	[1915] 2 Ch. 439	45
Norfolk's (Duke) Case	3 Ch. Cas. 1	449
Norris *v.* Gawtry Hundred	Hob. 139	160
North, In re	[1895] 2 Q. B. 264	160
North Australian Territory Co., Ld., In re	45 Ch. D. 87	34
Northbourne (Lord) *v.* Johnston & Son	[1922] 2 Ch. 309	5
Northumberland (Duke) *v.* Inland Revenue Commissioners	[1911] 2 K. B. 343	30, 997
Norton, In re	[1929] 1 Ch. 84	52

O.

O'Connor *v.* Marjoribanks	4 Man. & Gr. 435	273, 622
Oldrey *v.* Union Works, Ld.	[1895] W. N. 77	962
Olds Discount Co., Ld. *v.* Cohen	159 L. T. 335	538
——— *v.* Playfair (John), Ld.	159 L. T. 332	538
Oliver, In re	62 L. T. 533	911
Osborne *v.* Bradley	[1903] 2 Ch. 446	7, 668
Owen, In re	[1912] 1 Ch. 519	911, 912
Outhwaite, In re	[1891] 3 Ch. 494	684

P.

Padstow Total Loss & Collision Assurance Association, In re	20 Ch. D. 137	432
Page *v.* Morgan	15 Q. B. D. 228	226
Palmer *v.* Grand Junction Water Works Co.	86 L. T. 352	5
——— *v.* Locke	15 Ch. D. 294	951
Parker's Settled Estates, In re	[1928] Ch. 247	52
Patch *v.* Shore	2 Dr. & Sm. 589	334
Paul, In re	[1921] 2 Ch. 1	469
Paynter *v.* Williams	1 C. & M. 810	313
Peareth *v.* Marriott	22 Ch. D. 182	654
Peel's Release, In re	[1921] 2 Ch. 218	786
Perkins, In re	[1907] 2 Ch. 596	84, 906
Pettit, In re. Le Fevre *v.* Pettit	[1922] 2 Ch. 765	750, 969
Petty, In re	[1929] 1 Ch. 726	239
Phillips *v.* Gutteridge	3 De G. J. & S. 332	279
Pickard, In re	[1912] 1 K. B. 397	494
Platt, In re. Sykes *v.* Dawson	[1916] 2 Ch. 563	279
Plumptre's Marriage Settlement, In re	[1910] 1 Ch. 609	333
Pontypridd Union (Guardians of) *v.* Drew	[1927] 1 K. B. 214	262

		PAGE
Popham, In re	111 L. T. 524	906
Powell *v.* Brodhurst	[1901] 2 Ch. 160	334
Pownell *v.* Graham	33 Beav. 242	468
Poyser, In re	[1908] 1 Ch. 828	706
———, In re. Landon *v.* Poyser	[1908] 1 Ch. 828	988
———, In re	[1910] 2 Ch. 444	78, 906
Pretoria Pietersburg Rail. Co., Ld., In re	[1904] 2 Ch. 170	34
Prior's Case, The	1 Smith's L. C. ed. 13, p. 55	5
Pryce, In re	[1917] 1 Ch. 234	329
Pryor *v.* Pryor	2 D. J. & S. 205	16
Public Works Commissioner *v.* Logan	[1903] A. C. 355	856
Pugh *v.* Leeds (Duke)	2 Cowp. 714	160
Pullen *v.* Koe	[1913] 1 Ch. 9	333
Pye, Ex parte	18 Ves. 140; 2 Wh. & T. L. C., 9th Ed., 314	478

Q.

Quart *v.* Eager	(1909) 12 Ont. W. R. 735	450
Queen Anne's Bounty *v.* Tithe Redemption Commission	[1938] Ch. 229	158
Quinn *v.* Leathem	[1901] A. C. 495	189

R.

R. *v.* Brown	39 J. P. Newsp. 388	431
— *v.* Housing Appeal Tribunal	[1920] 3 K. B. 334	6
— *v.* Stuart	2 Times L. R. 144	36
Radcliffe, In re	[1892] 1 Ch. 227	951
Randall, *v.* Cooke. In re Cooke	[1916] 1 Ch. 480	709, 988
Ratcliffe *v.* Winch	16 Beav. 576	1009
Rayner, In re	[1904] 1 Ch. 176	859, 1016
Reckitt, In re	[1932] 2 Ch. 144	971
Rees, In re. Rees *v.* George	17 Ch. D. 701	706, 989
—— *v.* George. In re Rees	17 Ch. D. 701	706, 989
Reid *v.* Bickerstaff	[1909] 2 Ch. 305	6, 667
—— *v.* Rigby & Co.	[1894] 2 Q. B. 40	293
Reigate *v.* Union Manufacturing Co. (Ramsbottom), Ld.	[1918] 1 K. B. 592	773
Renals *v.* Cowlishaw	9 Ch. D. 125	5, 668
Reversion Fund & Insurance Co., Ld. *v.* Maison Cosway, Ld.	[1913] 1 K. B. 364	293
Rice *v.* Rice	2 Drew 73	539
Richards, In re	[1921] 1 Ch. 514	923
Richardson, In re	[1915] 1 Ch. 353	796
Richmond *v.* Branson & Son	[1914] 1 Ch. 968	185
Richmond's Trustee *v.* Richmond	1935 S. C. 585	970
Roberts *v.* Hopwood	[1925] A. C. 578	432, 897
Robinson, In re. McLaren *v.* Public Trustee	[1911] 1 Ch. 502	1001
——— *v.* Ommanney	21 Ch. D. 780; 23 Ch. D. 285	821
——— *v.* Wheelwright	6 De G. M. & G. 535	702
Rock *v.* Leighton	1 Salk. 310	1010
Rogers *v.* Hosegood	[1900] 2 Ch. 388	5, 680
——— *v.* Ingham	3 Ch. D. 351	1002
Roswell *v.* Prior	12 Mod. 635	804
Roundel *v.* Currer	2 Bro. C. C. 67	702

		PAGE
Rowell *v.* Satchell	[1903] 2 Ch. 212	667
Rowley *v.* Rowley	Kay, 242	14
Rush, In re. Warre *v.* Rush	[1922] 1 Ch. 302	30
Russell *v.* Ledsam	14 M. & W. 574	160
Russian Commercial & Industrial Bank *v.* Comptoir d'Escompte de Mulhouse	[1925] A. C. 112	185
Ryland, In re	[1903] 1 Ch. 467	410
Rylands *v.* Fletcher	L. R. 3 H. L. 330	401

S.

Sadler *v.* Worley	[1894] 2 Ch. 170	962
Samuel *v.* Newbold	[1906] A. C. 461	447, 538
Saunders *v.* Shafto	[1905] 1 Ch. 126	15
Schreiber *v.* Creed	10 Sim. 9	675
Scott, In re	[1903] 1 Ch. 1	478
——, In re	[1915] 1 Ch. 592	529
—— *v.* Inland Revenue Commissioners	[1935] Ch. 246; [1937] A. C. 174	343
Selwyn (A. H.), Ld. *v.* Baker	[1924] W. N. 195	842
Sharpington *v.* Fulham Guardians	[1904] 2 Ch. 449	773
Shaw, In re	[1929] W. N. 246	1017
Shee, In re	[1934] 1 Ch. 345	83
Sheffield & South Yorkshire Permanent Building Society *v.* Aizlewood	44 Ch. D. 412	523
Shelley's Case	1 Co. Rep. 93a	100
Shrewsbury Estate Acts, In re	[1924] 1 Ch. 315	654
Sillence, In re	7 Ch. D. 238	695
Simpson *v.* Westminster Palace Hotel Co.	8 H. L. C. 712	44
Sinclair *v.* Brougham	[1914] A. C. 398	293
Singer *v.* Williams	[1921] 1 A. C. 41	1015
Sleet, In re	[1894] 2 Q. B. 797	595
Smith, In re	[1904] 1 Ch. 139	469
—— *v.* Kenrick	7 C. B. 515	393
—— *v.* Mansel. In re Mansel	[1930] 1 Ch. 352	988
Smyth, In re	[1898] 1 Ch. 89	136
Somes, In re	[1896] 1 Ch. 250	945
South East Lancashire Insurance Co., Ld., In re	[1935] Ch. 225	507
South Eastern Ry. Co. *v.* Associated Portland Cement Manufacturers (1900), Ld.	[1910] 1 Ch. 12	450
South Staffordshire Tramways Co. *v.* Sickness & Accident Insurance Association, Ld.	[1891] 1 Q. B. 402	161
Sovereign Life Assurance Co., In re	42 Ch. D. 540	882
Spencer *v.* Willis. In re Willis	[1911] 2 Ch. 563	858
Spicer *v.* Martin	14 App. Cas. 12	668
Spiral Glove (No. 2), Ld., In re	[1902] 2 Ch. 209	539
Stapleton *v.* Crofts	18 Q. B. 367; 21 L. J. (Q. B.) 247	622
Stelfox *v.* Sugden	Johnson, 234	277
Stovold, In re	6 Morrell, 7	763
Strathcona (Lord) *v.* Inland Revenue	1929 S. C. 800	865
Stray, In re, Ex parte Stray	L. R. 2 Ch. 374	145
Stuart *v.* Kennedy	3 Ir. Jur. 305	946
Stucley, In re	[1906] 1 Ch. 67	539
Sturt, In re	[1922] 1 Ch. 416	94

		PAGE
Sudeley (Lord) *v.* Att.-Gen.	[1896] 1 Q.B. 354; [1897] A.C. 11	136
Swinburne *v.* Andrews	[1923] 2 K. B. 483	387
Sykes *v.* Dawson. In re Platt	[1916] 2 Ch. 563	279

T.

Tailby *v.* Official Receiver	13 App. Cas. 523	998
Talbot *v.* Braddill	1 Vern. 183, 393	445
Taylor, In re	56 L. J. (Ch.) 597	923
——— *v.* Great Eastern Ry. Co.	[1901] 1 Q. B. 774	227
———, Sons & Co., Ex parte. In re Brindley	[1906] 1 K. B. 377	145
Tea Corporation, In re	[1904] 1 Ch. 12	45
Teevan *v.* Smith	20 Ch. D. 724	445
Tennant *v.* Lord Advocate	[1939] A. C. 207	618
Terrewest *v.* Featherby	2 Mer. 480	1009
Tetlow *v.* Orela, Ld.	[1920] 2 Ch. 24	570
Tharp *v.* Tharp	[1916] 1 Ch. 142	622
Thomas, In re	[1930] 1 Ch. 194	741
——— *v.* Thomas	2 K. & J. 79	831
Thompson, In re	[1906] 2 Ch. 199	469
———, In re	[1908] W. N. 195	906
——— *v.* Gibson	7 M. & W. 456	804
——— *v.* Gill	[1903] 1 K. B. 760	602
Thorley, In re	[1891] 2 Ch. 613	352
Timms, In re	47 L. J. (Ch.) 831	1009
Tobias & Co., In re	8 Morr. 30	491
Tod, In re. Bradshaw *v.* Turner	[1916] 1 Ch. 567	708, 989
Todd *v.* Bielby	27 Beav. 353	940
Todrick *v.* Western National Omnibus Co., Ld.	[1934] Ch. 561	861
Tong, In re	[1930] 2 Ch. 400; [1931] 1 Ch. 202	238, 352
Topham *v.* Portland (Duke of) (No. 1)	1 D. J. & S. 517	14
——— *v.* Portland (Duke of) (No. 2)	L. R. 5 Ch. 40	15
Towry Law *v.* Burne. In re Ellenborough	[1903] 1 Ch. 697	993
Tregaskis, In re	6 Morr. 309	495
Trethewy *v.* Helyar	4 Ch. D. 53	988
Tulk *v.* Moxhay	2 Ph. 774	668
Turner's Will Trusts, In re	[1937] Ch. 15	687
Twopeny's Settlement, In re. Munro *v.* Twopeny	[1924] 1 Ch. 522	94
Tye, In re	[1900] 1 Ch. 249	263
Tyrrell's Estate, In re	[1907] 1 I. R. 194	449

U.

Underwood (A. L.), Ld. *v.* Bank of Liverpool & Martins	[1924] 1 K. B. 775	293
Union of London & Smith's Bank, Ld.'s, Conveyance	[1933] 1 Ch. 611	5
United British Insurance Co.	[1929] 2 Ch. 430	881, 882
United London & Scottish Insurance Co. *v.* Omnium Insurance Corporation	84 L. J. (Ch.) 777	881

		PAGE
United States of America *v.* McRae .	L. R. 8 Eq. 69 . . .	185
———— *v.* Wagner .	L. R. 2 Ch. 582 . . .	182

V.

Vatcher *v.* Paull	[1915] A. C. 372 . . .	14
Vitoria, In re	[1894] 1 Q. B. 259 . . .	695
Vizard's Trusts, In re . . .	L. R. 1 Ch. 588 . . .	30

W.

Wait, In re	[1927] 1 Ch. 606 . . .	540
Walburn *v.* Ingilby	1 My. & K. 61 . . .	36
Walker, In re	[1908] 2 Ch. 705 . . .	94
Wandsworth Union (Guardians of) *v.* Worthington	[1906] 1 K. B. 420 . . .	263
Warre *v.* Rush. In re Rush . .	[1922] 1 Ch. 302 . . .	30
Wasserberg, In re	[1915] 1 Ch. 195 . . .	924
Waters, Ex parte	L. R. 18 Eq. 701 . . .	495
Watson, In re	[1893] 1 Q. B. 21 . . .	602
——— *v.* Craven. In re Craven .	[1914] 1 Ch. 358 . . .	988
Wennhak *v.* Morgan . . .	20 Q. B. D. 635 . . .	624
Wesleyan & General Assurance Society *v.* Attorney-General . .	[1933] Ch. 591 . . .	507
West Cumberland Iron & Steel Co. *v.* Kenyon	11 Ch. D. 782 . . .	403
West Derby Union *v.* Metropolitan Life Assurance Society . .	[1897] A. C. 647 . . .	444
West Ham Union (Guardians of). Pearson	62 L. T. 638 . . .	262
Western *v.* Macdermot . . .	L. R. 1 Eq. 499 . . .	675
Westminster Bank *v.* Everett. In re House	[1929] 2 Ch. 166 . . .	201
Westminster & Brymbo Coal & Coke Co. *v.* Clayton	36 L. J. (Ch.) 476 . . .	401
Weston, In re. Bartholomew *v.* Menzies	[1902] 1 Ch. 680 . .	922, 930
White, In re. Knight *v.* Briggs .	[1925] Ch. 179 . . .	814
——— *v.* Bijou Mansions, Ld. . .	[1937] Ch. 610 . . .	4
——— *v.* Chitty	L. R. 1 Eq. 372 . . .	975
White Star Line, Ld., In re . .	[1938] Ch. 458 . . .	44
Wilkins, In re	27 Ch. D. 703 . . .	940
Wilkinson, Ex parte. In re London, Brighton & South Coast Ry. Co. .	3 De G. & Sm. 633 . .	279
Williames, In re	52 L. T. 41 ; 54 L. T. 105 .	906
Williams, Ex parte	46 L. T. 237 . . .	695
———— In re	[1936] Ch. 509 . . .	752
———— *v.* Ingram . . .	16 Times L. R. 434 . . .	36
———— *v.* Morgan . . .	[1906] 1 Ch. 804 . . .	444
———— Settlement, In re . .	4 K. & J. 87 . . .	235
Williamson *v.* Codrington . .	1 Ves. Sen. 511 . . .	334
Willis, In re. Spencer *v.* Willis .	[1911] 2 Ch. 563 . . .	858
Wilson *v.* Kelland	[1910] 2 Ch. 306 . . .	541
Wimbledon & Putney Commons Conservators *v.* Tuely . . .	[1931] 1 Ch. 190 . . .	431
Winsford Urban District Council *v.* Cheshire Lines Committee . .	21 Rail. & Can. C. 10 . .	495

		PAGE
Woking Urban District Council. (Basingstoke Canal) Act, 1911	[1914] 1 Ch. 300	787
Wombwell's Settlement, In re. Clerke *v.* Menzies	[1922] 2 Ch. 298	1001
Womersley, In re. Etheridge *v.* Womersley	29 Ch. D. 557	1009
Wood *v.* Drew	33 Beav. 610	450
——— *v.* Manchester Corporation	(Unreported)	845
Woodhouse *v.* Shepley	2 Atk. 535	823
Woolworth (F. W.) & Co., Ld. *v.* Lambert	[1937] Ch. 37	555
Worthing Corporation *v.* Heather	[1906] 2 Ch. 532	450
Worthington, In re	[1933] Ch. 771	239
Wright, In re.	[1920] 1 Ch. 108	15
Wroughton *v.* Colquhoun	1 De G. & Sm. 357	270

Y.

Young (John) & Co. *v.* Bankier Distillery Co.	[1893] A. C. 691	402
Yukon Consolidated Gold Corporation, Ld. *v.* Clark	[1938] 2 K. B. 241	602

CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

MARQUESS OF ZETLAND *v.* DRIVER.

[1936. Z. 606.]

C. A.
1938
Feb. 3;
March 17.

Restrictive covenants—Nothing to be done if in vendor's opinion detrimental to neighbourhood—Covenant for benefit of whole or part of land remaining unsold or sold by vendor or successors in title with express benefit of covenant—Part of land a mile distant—Sale of fried fish for consumption off premises—Action to restrain by vendor's successor in title—Form of injunction.

In 1928 the late Marquess of Zetland, being tenant for life of settled land, sold and conveyed in fee simple part of the settled land, known as No. 200 Lord Street, Redcar, to a purchaser, who by the conveyance entered into a covenant with the vendor (declared to be for the benefit and protection of such part or parts of the settled land as should for the time being remain unsold or as should have been sold by the vendor or his successors in title with the express benefit of the covenants) that (inter alia) " no " act or thing shall be done or permitted thereon which in the " opinion of the vendor may be a public or private nuisance or " prejudicial or detrimental to the vendor and the owners or " occupiers of any adjoining property or to the neighbourhood." The term " vendor " was to include, where the context so admitted, his successors in title. Certain parts of the unsold land were contiguous to No. 200 Lord Street and others were more than a mile distant. In 1929, on the death of the vendor, the first plaintiff became entitled in possession as tenant in tail male to the unsold part of the settled land. In 1935 No. 200 Lord Street was conveyed to the first defendant, and after that date he and the second defendant used the premises for the sale of fried fish for consumption off the premises. In 1936 the first plaintiff, being

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Reported by Sir Lancelot Elphinstone, Barrister-at-law, from the notes of the late W. Ivimey Cook

of opinion that this user was detrimental to the amenities of the neighbourhood and his own property, brought an action to restrain the defendants from (inter alia) using any part of the premises for frying fish or other substances for consumption off the premises:—

Held, (1.) that in forming his opinion the first plaintiff was in no sense performing a judicial or quasi-judicial function and was under no obligation to give the defendants an opportunity of being heard;

(2.) that on the true construction of the covenant only such acts or things as were, in the opinion of the vendor or his successors in title, injurious to the unsold land were within the covenant;

(3.) that the rule against perpetuities did not apply to the covenant;

(4.) (reversing the decision of Bennett J.) that, as the covenant was, in effect, expressed to be for the benefit of the whole or any part or parts of the unsold settled property, and not merely for the benefit of the whole land, *In re Ballard's Conveyance* [1937] Ch. 473 was no authority against the enforceability of the covenant;

(5.) that the injunction must be limited to fried fish and the words "other substances" deleted, because the opinion of the first plaintiff was confined to fried fish;

(6.) that the period of the injunction must be confined to so long as the first plaintiff or some other successor in title of the late Marquess should retain unsold any part of the settled property for the benefit of which the covenant was imposed.

APPEAL from a decision of Bennett J. (1)

By a settlement dated August 2, 1871, land at Redcar in Yorkshire (including a piece of land subsequently known as No. 200 Lord Street) was settled to uses under which, on September 10, 1928, the first Marquess of Zetland was tenant for life in possession and the first plaintiff was entitled to an entailed interest in remainder. On June 15, 1926, a vesting deed was executed in favour of the first Marquess.

By a conveyance dated September 10, 1928, the first Marquess conveyed to David Goodswen in fee simple the piece of land subsequently known as No. 200 Lord Street. Clause 2 of the conveyance provided: "The purchaser to the "intent and so as to bind as far as practicable the said property "hereby conveyed into whosesoever hands the same may "come and to benefit and protect such part or parts of the "lands in the Borough Township or Parish of Redcar, in the "North Riding of the County of York, now subject to the

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(1) [1937] Ch. 651.

C. A.
1938
ZETLAND (MARQUESS)
v.
DRIVER.

"settlement (*a*) as shall for the time being remain unsold or "(*b*) as shall be sold by the vendor or his successors "in title with the express benefit of this covenant, covenants "with the vendor that the purchaser will at all times "observe, perform and keep the said stipulations contained "in the Second Schedule hereto." The Second Schedule provided: " (*a*) that the property hereby conveyed shall not "(except with the previous consent in writing of the vendor, "which expression in this Schedule includes where the "context admits his successors in title) be used for any other "purpose than the erection of a shop and dwelling-house . . . . "(*d*) that no intoxicating or spirituous liquors shall be sold "from the premises and in particular that no part of the land "hereby conveyed shall be used for the purposes of a club "and that no act or thing shall be done or permitted thereon "which in the opinion of the vendor may be a public or a "private nuisance or prejudicial or detrimental to the vendor "and the owners or occupiers of any adjoining property or "to the neighbourhood." The covenant was duly registered as a land charge.

On March 11, 1929, the first Marquess died and the first plaintiff, who succeeded to the title, became entitled in possession as tenant in tail male to the land comprised in the settlement dated August 2, 1871. On July 10, 1929, a vesting assent was made in favour of the first plaintiff. On March 11, 1929, and at all material times thereafter portions of the land at Redcar were unsold and remained subject to the settlement.

On April 2, 1935, David Goodswen conveyed No. 200 Lord Street, on which a shop had been erected, to the first defendant, William Driver, in fee simple, with notice of the restrictive covenants. Thereafter the first defendant and the second defendant, Eric Wilson, carried on at No. 200 Lord Street the business of keeping an eating-house for the consumption of fried fish and other food. In April, 1936, the defendants obtained a licence from the local authority authorizing the sale of fried fish at the premises for consumption off the premises, and thereafter the defendants

C. A.
1938
ZETLAND (MARQUESS) v. DRIVER.

carried on that business on the premises in addition to the business theretofore carried on by them.

As a result of complaints as to the carrying on by the defendants of the business of selling fried fish for consumption off the premises, the first plaintiff formed the opinion that such sales were detrimental to the amenities of the neighbourhood and to his own property. The defendants were duly informed of this and requested to give up the business, but they refused so to do. On July 7, 1936, the first plaintiff, together with the second plaintiffs, the Zetland Estates Company (in whom by a conveyance dated March 5, 1927, the first plaintiff had vested his equitable reversionary interest), commenced this action, claiming an injunction to restrain the defendants, their servants, workmen or agents, from using any part of No. 200 Lord Street for the frying of fish or other substances for consumption off the premises or from doing or permitting any other act or thing which in the opinion of the first plaintiff or other the successor in title of the late Marquess might be a public or private nuisance or prejudicial or detrimental to the first plaintiff or his successor in title as aforesaid and to the owners or occupiers of any adjoining premises or the neighbourhood. No evidence was called to show that the defendants were committing a nuisance. The parties agreed that the lands, for the benefit of which the covenant was taken, included (i.) a small portion of land contiguous to No. 200 Lord Street; (ii.) a number of scattered parcels of land to the north and west with houses built on them; and (iii.) to the south, beyond a large area covered with buildings, certain land part of which was more than a mile away.

BENNETT J., by whom the action was tried, *held* (i.), following *White* v. *Bijou Mansions, Ld.* (1), that the first plaintiff, not being the original covenantee, was not enabled to sue upon the covenant by s. 56, sub-s. 1, of the Law of Property Act, 1925, and (ii.), purporting to follow *In re Ballard's Conveyance* (2), that the first plaintiff, not being the owner of any land to which the benefit of the covenant

(1) [1937] Ch. 610.

(2) [1937] Ch. 473.

had been effectually annexed, had no right to enforce the covenant. He accordingly dismissed the action with costs.

The plaintiffs appealed. The appeal was heard on February 3, 1938.

Cyril Radcliffe K.C. and *J. Neville Gray* for the appellants. The benefit of the covenant was intended to be attached to and run with the unsold land, so no express assignment to the first plaintiff of the benefit was necessary. There was no building scheme. [They referred to *Renals* v. *Cowlishaw* (1) ; *Rogers* v. *Hosegood* (2) ; *Union of London & Smith's Bank, Ld.'s Conveyance*. (3)] On the true construction of the conveyance the benefit of the covenant ran with every part of the unsold land which was capable of being benefited by the covenant. No particular form of words are necessary to effect this: *Drake* v. *Gray*. (4) Here if the power to prevent something being done on the land conveyed to the covenantor affects the value of the vendor's unsold land, the covenant becomes one the benefit of which is capable of being annexed to the vendor's unsold land.

A covenant taken by a vendor to enable him to dispose of his unsold land to greater advantage does not run with the land in the strict sense until it is annexed to the unsold land by the vendor : *Renals* v. *Cowlishaw* (1) ; *Master* v. *Hansard* (5) ; *Union of London & Smith's Bank, Ld.'s Conveyance*. (3) In such cases the land intended to be benefited may be ascertained in a most general way, not by words, but from circumstances : *Ives* v. *Brown* (6) ; *Lord Northbourne* v. *Johnston & Son* (7) ; *Chambers* v. *Randall* (8) ; *Union of London & Smith's Bank, Ld.'s Conveyance*. (3) [They also referred to *Keates* v. *Lyon* (9) ; *Child* v. *Douglas* (10) ; *Palmer* v. *Grand Junction Waterworks Co.* (11) ; and *The Prior's Case*. (12)]

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(1) (1878) 9 Ch. D. 125.
(2) [1900] 2 Ch. 388.
(3) [1933] 1 Ch. 611.
(4) [1936] Ch. 451.
(5) (1876) 4 Ch. D. 718.
(6) [1919] 2 Ch. 314.
(7) [1922] 2 Ch. 309.
(8) [1923] 1 Ch. 149.
(9) (1869) L. R. 4 Ch. 218.
(10) (1854–6) Kay, 560 ; 5 De G. M. & G. 739.
(11) (1902) 86 L. T. 352.
(12) (1368) 1 Smith's L. C., ed. 13, p. 55.

C. A.
1938
ZETLAND (MARQUESS) v. DRIVER.

F. R. Evershed K.C. and *B. S. Tatham* for the respondents. The covenant is too vague and uncertain to be enforced. In the context "vendor" cannot include his successor in title. [They referred to *London County Council* v. *Allen* (1); *Union of London & Smith's Bank, Ld.'s Conveyance.* (2)] If the opinion of the vendor is to take away a right of property, it becomes a quasi-judicial act: *Rex* v. *The Housing Appeal Tribunal* (3); *Labouchere* v. *Earl of Wharncliffe* (4); *Dawkins* v. *Antrobus.* (5)

[THE M.R. The real question is whether the deciding authority is a quasi-judicial authority or not.]

The covenant must be construed strictly: *Brigg* v. *Thornton.* (6) The covenant is a personal covenant: *Keates* v. *Lyon.* (7) It also infringes the rule against perpetuities. An interest in land is created when the vendor forms his opinion, which might not happen for fifty years: *London & South Western Ry. Co.* v. *Gomm.* (8) An expression of opinion may be capricious. This will prevent the Court from granting an injunction: *Low* v. *Innes.* (9) The benefit of the covenant will not pass unless expressly assigned: *Reid* v. *Bickerstaff.* (10)

Cyril Radcliffe K.C. replied.

Cur. adv. vult.

1938. March 17. The following judgment of the Court (SIR WILFRID GREENE M.R., LUXMOORE and FARWELL JJ.) was read by FARWELL J. This is an appeal by the plaintiffs from an order of Bennett J., dated July 29, 1937, dismissing the action with costs. The first appellant (hereinafter referred to as "the appellant") is the estate owner in fee simple of certain lands and hereditaments in Redcar in the county of York and the beneficial interest in the property is vested in the second appellant during the appellant's life. [The judgment then stated the facts and proceeded:] The respondents by their defence put in issue the right of the appellant to enforce the covenant. They deny that the business complained of is a

(1) [1914] 3 K. B. 642.
(2) [1933] 1 Ch. 611.
(3) [1920] 3 K. B. 334.
(4) (1879) 13 Ch. D. 346.
(5) (1881) 17 Ch. D. 615.
(6) [1904] 1 Ch. 386.
(7) L. R. 4 Ch. 218.
(8) (1882) 20 Ch. D. 562.
(9) (1864) 4 De G. J. & S. 286.
(10) [1909] 2 Ch. 305.

breach of the covenant. They further say that the opinion of the appellant was wholly unreasonable and capricious and that in forming an opinion he was acting in a quasi-judicial capacity and was, therefore, bound to give the respondents an opportunity of being heard before coming to any conclusion and that this he has failed to do. In addition, they plead laches and acquiescence as a bar to the relief sought.

It will be convenient to dispose at once of those last mentioned pleas. In our judgment, there is no foundation for the plea of laches or acquiescence, nor is there anything in the evidence to support the contention that the opinion which the appellant formed as to the respondents' business was capricious or other than a bona fide opinion formed after a proper consideration of the facts. In forming his opinion the appellant was in no sense performing a judicial or quasi-judicial function, and he was, therefore, under no obligation to give the respondents an opportunity of being heard. The club cases, such as *Labouchere* v. *Earl of Wharncliffe* (1) and *Dawkins* v. *Antrobus* (2), which were much relied on by the respondents, have no application to this case.

There remains to be considered the real issue in this appeal—namely, whether the covenant is enforceable by the appellant. Covenants restricting the user of land imposed by a vendor upon a sale fall into three classes: (i.) covenants imposed by the vendor for his own benefit; (ii.) covenants imposed by the vendor as owner of other land, of which that sold formed a part, and intended to protect or benefit the unsold land; and (iii.) covenants imposed by a vendor upon a sale of land to various purchasers who are intended mutually to enjoy the benefit of and be bound by the covenants: *Osborne* v. *Bradley*. (3)

Covenants of the first class are personal to the vendor and enforceable by him alone unless expressly assigned by him. Covenants of the second class are said to run with the land and are enforceable without express assignment by the owner for the time being of the land for the benefit of which they were imposed. Covenants of the third class are most usually

(1) 13 Ch. D. 346.
(2) 17 Ch. D. 615.
(3) [1903] 2 Ch. 446, 450.

C. A.
1938
ZETLAND
(MARQUESS)
v.
DRIVER.

found in sales under building schemes, although not strictly confined to such sales. It is not suggested that the present covenant falls within this class. Nor will it assist the appellant if it falls within the first class, since he was not the original covenantee or an express assignee from him. If, therefore, the appellant is entitled to sue on this covenant it must fall within the second class above mentioned.

Such covenants can only be validly imposed if they comply with certain conditions. Firstly, they must be negative covenants. No affirmative covenant requiring the expenditure of money or the doing of some act can ever be made to run with the land. Secondly, the covenant must be one that touches or concerns the land, by which is meant that it must be imposed for the benefit or to enhance the value of the land retained by the vendor or some part of it, and no such covenant can ever be imposed if the sale comprises the whole of the vendor's land. Further, the land retained by the vendor must be such as to be capable of being benefited by the covenant at the time when it is imposed. Thirdly, the land which is intended to be benefited must be so defined as to be easily ascertainable, and the fact that the covenant is imposed for the benefit of that particular land should be stated in the conveyance and the persons or the class of persons entitled to enforce it. The fact that the benefit of the covenant is not intended to pass to all persons into whose hands the unsold land may come is not objectionable so long as the class of persons intended to have the benefit of the covenant is clearly defined. Finally, it must be remembered that these covenants can only be enforced so long as the covenantee or his successor in title retains some part of the land for the benefit of which the covenant was imposed. Applying those conditions to the present case, the covenant sued upon appears to comply with them. The covenant is restrictive; it is expressly stated in the conveyance to be for the benefit of the unsold part of the land comprised in the settlement and such land is easily ascertainable, nor is it suggested that at the date of the conveyance the land retained was not capable of being benefited by the restrictions, and lastly the appellant is the successor in title of the original covenantee and as such is the estate owner of part of the land unsold which is subject to the settlement. That being so, the appellant is the person now entitled to the benefit of the covenant and, prima facie, is entitled to enforce it against the respondents who, although not the original covenantors, took their land with notice of the restrictions and are, therefore, bound by them.

It is said, however, on behalf of the respondents, that this covenant is not one which can run with the land because it is imposed for the benefit, not only of the unsold land of the vendor, but also for the benefit of the adjoining owners and the neighbourhood. If that were the true construction of the covenant, that might be so; but in our judgment, reading the covenant as a whole, it cannot be so construed. The paramount purpose of the covenant, as appears from the conveyance itself, is to benefit and protect the unsold land of the vendor, and only such acts or things as are, in the opinion of the appellant or his successors in title, injurious to that land are within the restrictions, and consequently nothing which would be a nuisance or annoyance to an adjoining owner or the neighbourhood is within the covenant, unless it is also detrimental or injurious to the unsold land of the vendor. The covenant is, therefore, not impeachable on this ground. Then it was said that it was open to objection as offending the rule against perpetuities, but in our judgment there is no ground for such contention. The formation of an opinion by a successor in title of the original vendor at whatever time cannot operate to create any new estate or revest the land and, consequently, the rule against perpetuities has no application.

Under those circumstances, there does not appear to be any ground on which the appellant can properly be refused the relief which he seeks; but Bennett J. took the opposite view and held that the benefit of the covenant had not passed to the appellant. In coming to that conclusion he founded himself upon a decision of Clauson J. in *In re Ballard's Conveyance* (1), which he considered to be exactly in point and binding upon him. In our judgment the learned judge was wrong in thinking that

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(1) [1937] Ch. 473.

C. A.
1938
ZETLAND (MARQUESS) v. DRIVER.

In re Ballard's Conveyance (1) was an authority in this case. It is not necessary for us, and we do not propose, to express any opinion as to that decision beyond saying that it is clearly distinguishable from the present case, if only on the ground that in that case the covenant was expressed to run with the whole estate, whereas in the present case no such difficulty arises because the covenant is expressed to be for the benefit of the whole or any part or parts of the unsold settled property.

It is to be noticed in the present case that the benefit of the covenant is not intended to pass to a purchaser without express assignment. It is not necessary for us to express any opinion as to what would be the effect of a sale of part of the settled property with an express assignment of the covenant; but, if such a purchaser could enforce the covenant, it could only be for so long as some successor in title of the original covenantee retained some part of the settled property, since such a person alone can form the requisite opinion.

For these reasons the appeal must be allowed. The appellant is entitled to the injunction which he seeks subject to two limitations. In the first place the injunction must be limited to fried fish and the words "other substances" deleted, because the opinion of the appellant as to the nuisance was confined to fried fish, and secondly, the period of the injunction must be confined to so long as the appellant or some other successor in title of the original vendor retains unsold any part of the settled property for the benefit of which the covenant was imposed. Subject to those two alterations there will be an injunction in the terms of the prayer in the statement of claim and the respondents must pay the costs here and below.

Appeal allowed.
Leave to appeal to the House of Lords.

Solicitors: *Frere, Cholmeley & Co.; Griffith & Son, for Miles, Hutchinson & Lithgow, Middlesbrough.*

L. H. E.

(1) [1937] Ch. 473.

In re NICHOLSON'S SETTLEMENT.

MOLONY *v.* NICHOLSON.

In re SAME. SAME *v.* SAME.

C. A.
1938
June 22, 23;
July 18.

[1937. N. 523.]

Settlement—Power to appoint income of a fund to husband for life—Appointor's wish to benefit friends—Marriage of appointor when over eighty years of age—Exercise of power—No arrangement between appointor and appointee as to use of income for benefit of any one but himself—No fraud on power.

Where an appointor under a settlement has power to appoint the income of a fund in favour of one object only and exercises the power, it is necessary, in order to set aside the exercise of the power as a fraud on the power, to prove that there was some bargain, arrangement or understanding between the appointor and the appointee which fetters the appointed interest in the appointee's hands in favour of some person or persons other than himself.

Decision of Farwell J. [1938] Ch. 308 affirmed.

Two Appeals from the decision of Farwell J. (1)

On March 4, 1882, Elizabeth Ismay Nicholson, in conjunction with her children, made a settlement of certain property belonging to her. Under the settlement the income of the settled fund was to be paid to E. I. Nicholson for her life and on her death one-ninth part thereof was to be paid to each of her sons, Herbert I. Nicholson, Francis I. Nicholson, Cuthbert I. Nicholson, Gerald Nicholson, Gilbert H. Nicholson and Hugh S. Nicholson, and three one-ninth shares were to be held in trust for her daughters, Edith E. Nicholson, Esther S. Nicholson, and Martha M. Nicholson, for life, without power of anticipation, and on their death in trust for their issue as they should appoint, and in default of appointment in trust for their children in equal shares, with an ultimate gift over, in the event of there being no children, to the other beneficiaries. There then followed a proviso: "Provided

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(1) [1938] Ch. 308.

"always and it is hereby further agreed and declared that it "be lawful for any of the respective hereinbefore named "three daughters of the said Elizabeth Ismay Nicholson "notwithstanding any coverture or whether covert or sole "by any deed or deeds or writing or writings sealed and "delivered with or without power of revocation and new "appointment or by will or codicil to appoint that after her "own death all or any part of the dividends, interest and "income of her said portion or share or of so much thereof "as shall not have been or shall not be applied under any of "the trusts or powers of maintenance, education and advancement hereinafter contained shall be paid to any husband "who may survive her for his life or for any less period and "upon such conditions and with such restrictions and in such "manner as she shall think fit."

Elizabeth I. Nicholson died on October 2, 1897. Esther S. Nicholson died, without having been married, on November 18, 1929, and Martha M. Nicholson died, without having been married, on January 28, 1930. Edith E. Nicholson had for some years lived with a family in Oregon, in the United States of America. In 1933, when she was over eighty years of age, she became very anxious to make some provision for the family with whom she lived. She had, however, no means beyond the income she received from her settled share. She then began a correspondence with the solicitors who acted for the trustees of the settlement and for the family generally. In the course of that correspondence she sought to make a bargain with her relations that, if she were to release the power of appointment given to her in the proviso in the settlement, they should give up half of the capital, so that she might be free to dispose of that in the way she wished. Her relations, however, were not prepared to do that, notwithstanding the fact that she held out to them the possibility that if they would not agree she would marry and exercise her power of appointment. She did, in fact, marry in May, 1934, one Norris Quatermas. They never lived together, she continuing to reside with her friends and he with his sister. By a deed dated July 5, 1934, she exercised the power of appointment, given to her by the proviso, in favour of her husband. She died on September 6, 1936.

In these circumstances the plaintiff, who was, with one of the defendants, a trustee of the settlement, issued this summons, which raised the question whether or not the deed of July 5, 1934, was a fraud on the power of appointment given by the proviso in the settlement.

FARWELL J. said that the argument, as he understood it, was that, because there was evidence that the lady desired to benefit her friends and sought to make a bargain with her relations to release her power to appoint to a husband in consideration of obtaining a share of the capital out of which to benefit her friends, the appointment must be taken to have been made to enable her friends to benefit and it was therefore a fraud on the power. There was evidence, which was not disputed, that no sort of bargain or arrangement was made between the lady and her husband as to how he would deal with the income. In those circumstances it was impossible to suggest that there was a fraud on the power. The question of a fraud on a power of appointment when there was only one object of the power differed widely from the same question when the fund could be given to one or more of several objects. Where there was one object only, it was impossible to establish a fraud unless there was evidence of some arrangement or bargain between the appointor and appointee, not necessarily a legal bargain, but some arrangement under which the appointee was to benefit some one other than himself. The matter was totally different when the appointor had power to select among a class. In such a case it mattered not that the appointee did not know of the improper motive, and there was no necessity to prove an arrangement. There being no evidence that the appointee was under any legal or moral obligation to use the money otherwise than as he chose, the attempt to establish a fraud on the power failed.

There were two appeals from this decision by the legal personal representatives of brothers of the appointor. Both appeals, which raised the same question, were heard on June 22 and 23, 1938, and judgment was given on July 18, 1938.

R. F. Roxburgh K.C. and *Hon. B. L. Bathurst* for the appellants. Mrs. Quatermas's marriage was a mere accommodation marriage undertaken for the sole purpose of enabling her to provide for the family with which she lived. That is material to the question whether she intended and did in fact exercise her power of appointment for the benefit of some one other than her husband.

[SIR WILFRID GREENE M.R. Do you say that she made a bargain or had an understanding with her husband to apply the income appointed to him for the benefit of that family?]

No. It would seem that her plan miscarried, for her letters show that she plainly thought she would be able in this way to give effect to her intention. Where there is power to appoint among a class, it has been laid down that no agreement is necessary, and an intention to provide for some one not an object of the power is sufficient. Farwell J. found that this did not hold good where the power was to appoint to a single appointee, but it is contended that he was in error, and that all that has to be proved is an intention to benefit some one not an object of the power, and the intention need not be to benefit that person exclusively. Here Mrs. Quatermas made it clear before her marriage that her intention in marrying was to benefit the family she was living with. Her appointment was therefore a fraud on the power.

[CLAUSON L.J. Is there any reported case in which the exercise of a power to appoint to a named person or a person specified by description, such as a husband, has been held a fraud on the power?]

No. But the same principle is applicable. The primary trust is for the person who takes in default of appointment, and that trust can only be modified when the power of appointment is validly exercised: *Vatcher* v. *Paull* (1); *Topham* v. *Duke of Portland (No. 1)*. (2)

In Farwell on Powers, 3rd ed., p. 490, reference is made to *Rowley* v. *Rowley* (3), where Wood V.-C. distinguishes three classes of cases in which there may be a fraud on a power of appointment. The first of these is when the fraud is on the donor of the power or those claiming through him. This case belongs to that class. The power here is a fiduciary power, just as it is in the case of a power to appoint among a class, and the same rules apply. No doubt the line is a fine one between intention or purpose and hope or expectation, and in the absence of an element of intention there is no fraud on the power. But here the letters written by Mrs. Quatermas when she was trying to obtain freedom to deal with part of the settled fund reveal a clear intention. Cases relating to jointure, such as *Lane* v. *Page* (1), stand on a different footing, and there the appointment is invalid only to the extent that it is made with the intention to benefit some one other than the appointee. But in such a case as this the power must have been bona fide exercised for the purpose for which it was given or it is void in its entirety. The communication of the purpose is not essential: *Saunders* v. *Shafto.* (2) The intention to divert the appointed fund to some purpose other than that of benefiting the object of the power is sufficient to make it void: *Daubeny* v. *Cockburn.* (3) The whole test is, what was the state of mind of the appointor in exercising the power.

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(1) [1915] A. C. 372.

(2) (1863) 1 D. J. & S. 517.

(3) (1854) Kay, 242, 258.

It was contended before Farwell J. that the letters written by Mrs. Quatermas were inadmissible, but this does not accord with *In re Wright* (4), and they are admissible to show her state of mind. It is true that the matter to be taken into consideration is the purpose of the appointment and not the motive that led to it: *Topham* v. *Duke of Portland* (*No.* 1) (5); *Topham* v. *Duke of Portland* (*No.* 2). (6) But here the letters disclose a definite purpose in Mrs. Quatermas, both in marrying and appointing to the husband.

Cyril Radcliffe K.C. and *Geoffrey Cross* for the respondent. The facts are insufficient to support the case it is sought to set up. The appellants' real objection is to Mrs. Quatermas' having found a husband to whom she could appoint a life interest, but that is a matter in regard to which they have no

(1) (1754) 1 Amb. 233.
(2) [1905] 1 Ch. 126.
(3) (1816) 1 Mer. 626, 643.
(4) [1920] 1 Ch. 108.
(5) 1 D. J. & S. 517, 570.
(6) (1869) L. R. 5 Ch. 40, 57.

C. A.
1938
NICHOLSON'S SETTLEMENT, *In re.*
MOLONY *v.* NICHOLSON.

right to complain. Then it is hinted that the husband ought not really to be believed when he says that his wife made no communication to him of her hope and wish that he would use the appointed income for the benefit of the family with whom she was residing. But his evidence must be accepted, as he was not cross-examined.

Then on the basis of these facts, has any case been made which remotely suggests that there was here a fraud on the power? And for this purpose it would not matter whether the power was to appoint to an individual or a class. The appellants have distinguished between purpose or intention and motive or hope or expectation. But the distinction is not helpful in deciding this case. Lord Parker in *Vatcher* v. *Paull* (1) and P. O. Lawrence J. in *In re Wright* (2) were merely stating what they thought to be the law, and when authority for these statements is looked for it is *Topham* v. *Duke of Portland* (*No.* 1). (3) That is a case where there was a power to appoint to A. or B., and the appointment is made nominally to A.; but in truth and in substance for the benefit of C. The real objection to the appointment was that it was in reality made to a non-object. The same is true of *Topham* v. *Duke of Portland* (*No.* 2). (4) *Pryor* v. *Pryor* (5) shows that it is permissible to appoint to the object of the power although it is known or believed that the appointee will pass the benefit on to a non-object, but any bargain to that effect makes the appointment invalid: see also *In re Crawshay* (6) and *In re Marsden's Trust.* (7) There must be an effective intention, and here Mrs. Quatermas took no steps to give effect to her wish to benefit her friends. Further, a distinction must be drawn between a fiduciary power to select from among a class and a beneficial power to charge property in favour of one person. The former is a discretionary power. *In re Wright* (2) is inapplicable to a power to appoint to one person only. In such a case the appointee may pay the appointor to

(1) [1915] A. C. 372.
(2) [1920] 1 Ch. 108.
(3) 1 D. J. & S. 517.
(4) L. R. 5 Ch. 40.
(5) (1864) 2 D. J. & S. 205, 210.
(6) (1890) 43 Ch. D. 615.
(7) (1859) 4 Drew. 594.

exercise the power, as in the case of a wife paying her husband to exercise a jointuring power in her favour. This shows how far powers to appoint to a single person are from powers of selection among a class, and the distinction drawn by Farwell J. was justified: see *Saunders* v. *Shafto*. (1) The former power is in the strict sense a beneficial power, as opposed to a power to select among a class that would take in default of appointment. In a case like the present the appointment can only be avoided if it is shown to be colourable: see *Baldwin* v. *Roche* (2), which was adopted by the Court of Appeal in *Saunders* v. *Shafto*. (1)

J. G. Foster for the plaintiff.

Hon. B. L. Bathurst replied.

Cur. adv. vult.

1938. July 18. The judgment of the Court (SIR WILFRID GREENE M.R., SCOTT and CLAUSON L.JJ.) was read by CLAUSON L.J. This is an appeal from a judgment of Farwell J. (3), where the facts are set out in detail. For the purposes of this judgment the material facts may be summarized in a few sentences. Miss Nicholson, who was living in Oregon, was tenant for life of a fund which in default of her issue was to pass to relations of hers in England. She had for some years lived with friends in Oregon whose future welfare was her serious concern. She had power to appoint a life interest in the fund to a husband. When she was a spinster over eighty years of age she had endeavoured to arrange with her relations that she should have a portion of the capital placed at her free disposal, on the terms of her releasing her power of appointment in favour of a husband, and she mentioned the possibility of her marrying and exercising the power in favour of the husband. No arrangement was made. In May, 1934, she married Norris Quatermas, and on July 5, 1934, she exercised the power of appointment in favour of her husband. She died in 1936. The husband claims the income of the fund, and those to whom the property passes in default of appointment contest the validity of the appointment.

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(1) [1905] 1 Ch. 126.
(2) (1842) 5 Ir. Eq. R. 110.
(3) [1938] Ch. 308.

There is no question but that the marriage was valid. On the evidence it appears that there was no bargain, arrangement or understanding between the lady and her husband in any way fettering his complete control over the income appointed to him. There is no question but that, when the lady was seeking to obtain the consent of her relations to a release to her of some free property, she desired to obtain free property in order to make provision thereout for her friends with whom she was living at Oregon. Her husband was a near relation of those friends. It is easy to infer that when she appointed in her husband's favour she had it in mind that some of the income would find its way to the friends whose future welfare was her serious concern. On those facts the learned judge refused to find any invalidity in the exercise of the power of appointment. The question is whether this refusal on his part was correct.

For the present purpose it is to be noted that there are two types of powers of appointment which have to be distinguished. Of the first type are powers for an appointor to alienate in favour of a person filling a particular qualification (for example, husband or wife, to take the common case) a part of or an interest in the property, with the result of diminishing pro tanto the interest passing to persons to whom (subject to the exercise of the power of appointment) the property is given. Of the second type are powers for an appointor to select and define the beneficial interests inter se of the several members of a class of beneficiaries or their issue in a fund which (subject to the exercise of the power of appointment) is to pass in defined proportions to some or all of the members of the class.

In the case of either type of power the appointment will or may be vitiated either wholly or pro tanto if it is shown to have been made upon a bargain or even arrangement or understanding which fetters the appointed interest in the appointee's hands in favour either of the appointor himself or some outside party, or is directed to providing some advantage for the appointor or some outside party. The principle is that such an appointment amounts in substance to an appointment pro tanto in favour of some one outside the qualification stipulated for, or the class of beneficiary defined, by the donor of the power. The execution of the power is alien in reality, though possibly not in form, to the power conferred. The application of the principle is complicated by the fact that certain arrangements in respect of jointures have, under circumstances considered in this Court in the case of *Saunders* v. *Shafto* (1), been treated as good, though on the face of them obnoxious to the principle: and further difficulties are occasioned by the authorities which have dealt with the question how far appointments which are in part obnoxious to the principle can be treated as severable and supported in part though held to be bad in part. As, however, in the present case the evidence fails to disclose any bargain, arrangement or understanding between the appointor and appointee, and there is no suggestion of any dishonesty or of any fraud in the ordinary sense of the term, it is unnecessary to examine the principle or to discuss the limitation to which its application is subject.

There are, however, cases in the books in which there has been no fraud in the sense of dishonesty, and no bargain or arrangement between appointor and appointee such as above mentioned; but nevertheless the appointment has been treated as invalid by reason of the existence, though unknown to the appointee, of an intention that the purpose for which the power was created should be defeated (to use the language of Kindersley V.-C. in *In re Marsden's Trust* (2)), and that an object foreign to the power should be achieved. Such cases were those of *Topham* v. *Duke of Portland (No. 2)* (3), and others are to be found referred to in Farwell on Powers, 3rd ed., at pp. 477 to 480.

It would seem that in all the reported cases in which appointments have been invalidated on this ground, the power in question has been one which falls within the description of the second type above stated. It is not easy to see how this

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(1) [1905] 1 Ch. 126.
(2) 4 Drew. 594.
(3) L. R. 5 Ch. 40.

C. A.
1938

NICHOLSON'S SETTLEMENT, *In re.*
MOLONY *v.* NICHOLSON.

ground of invalidity can be applicable to the case of a power which is not one of selection and definition among members of a class but merely a power to carve out an interest from the property for the benefit of a person filling a particular qualification, where it is found, as in the present case, that such a power has been exercised so as to create the interest in favour of the qualified person without placing any fetter upon the enjoyment by him of that interest. In particular it is not easy to see why that person's position should be affected by the hope or even expectation on the part of the appointor that the appointee will use or apply the interest so given to him for some particular end. The position is different where the appointor has allowed himself, in exercising a duty, imposed on him by the donor of the power, of choosing among members of a class, to be swayed, not by a consideration of the needs or merits of the appointee, but by collateral considerations. The donor of the power, it may be said, gave the appointor the power of selection in order that his bounty might be fairly distributed among the possible beneficiaries, and not in order that a collateral purpose should be achieved. Where the power can be exercised only in favour of a particular person, and there is no question of selecting among a class, there is no room for any complaint of unfairness if the appointment results in fact in the appointee taking the appointed interest without any fetter. The appointee and no one else is benefited, as the donor of the power intended should be the case if the appointor chose to exercise the power ; and there is no detriment to any one else. Where, however, there is a power to select among a class, and a particular beneficiary is selected in order to achieve a collateral purpose, the result is pro tanto to diminish the interest of the other beneficiaries, a diminution which the appointor is no doubt authorized to effect in a bona fide attempt to achieve what he considers justice and fairness as between the beneficiaries, but which he is not authorized to effect in order to achieve a collateral purpose. While therefore it may well be that in the case of powers of the second type defined above the Court may inquire into the ultimate object which the appointor hopes to achieve, and where that object is collateral may invalidate the appointment, there is no authority for the proposition that such an inquiry is appropriate or permissible in the case of a power of the first type defined above; and we can discern no principle which would justify such an inquiry: on the contrary the very nature of the power, containing as it does no element of selection among competing objects of bounty, would seem to negative the appropriateness of any such inquiry.

Reference was made by counsel for the appellants to certain language used by P. O. Lawrence J. in *In re Wright*. (1) That was a case of a power of the second type defined above. The question whether the principles applicable to such a case would apply to the case of a power of the first type was not under the consideration of the learned judge, and the general language used in some passages in his judgment cannot be read as intended to deal with cases of a character different to that of the case which he was considering.

In the result there appears to be complete justification for the distinction which the learned judge below drew between the case before him and the cases where the power is one of selection among a class, and for his view that neither on principle nor on authority is there to be found any justification for the contention that the appointment in the present case in favour of the appointor's husband, being an honest appointment unfettered by any bargain, arrangement or understanding, is vitiated merely because the appointor had a hope or an expectation that the appointee would use his increased income for the benefit of his near relations, whose welfare was admittedly a matter of concern to the appointor.

The appeal will accordingly be dismissed with costs.

Appeal dismissed.

Solicitors: *Frere, Cholmeley & Co.*; *Freshfields, Leese & Munns.*

H. C. G.

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(1) [1920] 1 Ch. 108.

BENNETT
J.

1938
May 19;
June 15, 16;
July 28.

In re FORSTER.

GELLATLY *v.* PALMER.

[1936. F. 1570.]

Charity—Will—Gift of income in perpetuity to society for relief of infirm sick and aged priests—Trust for advancement of religion—Good charitable bequest.

A testatrix bequeathed a sum of 200*l.* to be paid annually out of the income of her residuary estate to "the Treasurer of "the Society for Infirm Roman Catholic Priests of the Diocese of "Clifton."

There was no society bearing the name used by the testatrix in her will and the "Society for the Relief of Infirm Sick and Aged "Roman Catholic Secular Priests in the Clifton Diocese" was admitted to be the society which the testatrix intended to benefit:—

Held, that the purpose of that society—namely, the assistance of a particular kind of priest—was a purpose which tended to advance religion; that the society was a charitable institution; and that the gift was a good charitable bequest.

In re Clark's Trust (1875) 1 Ch. D. 497 distinguished.

ADJOURNED SUMMONS.

The testatrix, Mrs. Elizabeth Marie Rodolpha Forster, by her will directed that 200*l.* should be paid annually out of the income of her residuary estate "to the Treasurer of the "Society for Infirm Roman Catholic Priests" of the Diocese of Clifton.

A summons was taken out by the trustees of the will for the determination of the question whether the gift took effect or failed.

There being no society with the name used by the testatrix in her will, it was admitted that the society which the testatrix intended to benefit was "The Society for the Relief of Infirm "Sick and Aged Roman Catholic Secular Priests in the "Clifton Diocese."

That Society was constituted by a deed of settlement dated November 10, 1862, and its affairs were managed in accordance with the provisions of that deed and a supplemental deed dated September 29, 1897.

The deed of 1862 contained a recital "that the parties "thereto are, with others, desirous of establishing at Clifton "a Society for the Relief of Aged or Infirm Priests of the "Roman Catholic Church to be supported by donations and "subscriptions."

Clause 2 of the deed of 1897 contained the following, among other, provisions :—" (A) The name of the Society shall be 'The "'Society for the Relief of Infirm Sick and Aged Roman Catholic "'Secular Priests in the Clifton Diocese.' (B) Any Roman "Catholic Secular Priest if formally incorporated in the Diocese "of Clifton and not now a member may apply to be admitted "a member of the Society. Every member shall pay an "entrance fee of two pounds two shillings and an annual "subscription of 1*l.* 1*s.* 0*d.* Any member may become a "life member so far as regards future immunity from the "payment of subscriptions on payment of the entrance fee "and a gross sum of 15*l.* 15*s.* 0*d.* (D) The funds of the Society "shall be applicable for the relief of Infirm Sick and Aged "Roman Catholic Secular Priests Members of the Society. "(F) In case a member shall leave the Diocese for any other "than a temporary purpose he shall except in the event "hereinafter mentioned cease to be a member Provided that "any member leaving the Diocese may apply to the "committee for permission to remain a member and the "committee shall in that case decide whether such permission "shall be granted or refused."

Roger Turnbull for the plaintiff.

R. F. Roxburgh K.C. and *F. McMullan* for two trustees of the will.

Norman Daynes K.C. and *Hon. Charles Russell* for the remaining trustee of the will.

Charles Harman K.C. and *Henry Johnston* for the treasurer of the Society. The Society is a charity, poverty being a necessary qualification of any priest entitled to relief out of its funds. It is also a charity, because its funds are to be used for the advancement of religion.

[They referred to *In re Lucas* (1) ; *In re Chaplin* (2) ;

(1) [1922] 2 Ch. 52.

(2) [1933] Ch. 115.

BENNETT J.
1938
FORSTER, *In re.*
GELLATLY *v.* PALMER.

In re Gosling (1); *In re Isabel Joanna James* (2); *Cunnack* v. *Edwards* (3); and *In re Buck.* (4)]

C. R. R. Romer K.C. and *L. W. Byrne* for the Public Trustee. Having regard to the rules of the Society, this Society is not a charity: see Tudor on Charities, 5th ed., p. 8.

Relief may be given to a rich member.

[They referred to *In re Amos* (5) and *In re Clark's Trust.* (6)]

J. W. Brunyate (*A. Andrewes Uthwatt* with him), for the Attorney-General, supported the argument on behalf of the treasurer of the Society.

Cur. adv. vult.

1938. July 28. BENNETT J. [after stating the question raised by the summons:] The gift is a gift of income in perpetuity, and it will, therefore, fail unless the Society for the Relief of Infirm, Sick and Aged Roman Catholic Secular Priests in the Clifton Diocese is a charity, or its funds are clothed with charitable trusts.

[After stating that the Society was constituted by the above mentioned deeds of settlement and after reading the material provisions of the deeds, his Lordship continued:]

Those are the provisions which have to be considered in order to determine whether the Society is a charity, or whether its funds are clothed with charitable trusts.

The first argument advanced on behalf of the defendant, Canon Iles, and supported by the Attorney-General, was to the effect that the priests to be relieved out of the funds of the Society must not only be infirm, sick and aged, but must also be poor, and, therefore, the purpose of the Society was the relief of poverty. Reliance was placed upon the decision of Lord Russell of Killowen, when a judge of first instance, in the case of *In re Lucas* (7), where there was a gift of income in perpetuity to the oldest respectable inhabitants in Gunville to the amount of 5*s*. a week. The learned judge was able to imply, from the amount of the gift, that poverty was a necessary qualification of a beneficiary.

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(1) [1900] W. N. 15; 48 W. R. 300.

(2) [1932] 2 Ch. 25.

(3) [1896] 2 Ch. 679.

(4) [1896] 2 Ch. 727.

(5) [1891] 2 Ch. 159.

(6) 1 Ch. D. 497.

(7) [1922] 2 Ch. 52.

The present case is quite different. The gift is to the Society for the purpose of augmenting its funds; and the question whether the priests to be relieved must be qualified by poverty depends entirely upon the provisions in the trust deed by which the Society is constituted, and not upon the terms of the will of the testatrix. The argument was almost entirely based upon the use of the word "Relief" in the title of the Society, and in clause 2 of the supplemental deed of 1897. This word, it was said, connoted poverty, and showed that the intention of the deed was that those who were to be relieved must be poor. I agree that the word "relief" is often used in a context which indicates poverty; but it is not so used exclusively. If I were to give effect to this argument, it would be a consequence of it that the trustees of the Society would be acting ultra vires if they assisted a priest who was not poor. I am not prepared to hold that poverty is an essential qualification of the recipients of relief out of the Society's funds; and, in my judgment, the argument that the Society is a charity because its funds are clothed with a trust for the relief of poverty fails.

The second ground taken was that the Society was a charity because its funds are clothed with a trust for the advancement of religion. I hold that on this ground the gift can be supported. Indirectly I think the cause of religion is advanced by a fund which is to be employed to assist sick, aged and infirm ministers of religion.

Such a fund, I think, tends to make the ministry more efficient by making it easy for the sick and old to retire and give place to the young and healthy. It may, I think, also ease the minds of those actively engaged in the ministry to know that there is this fund to be used for their relief, when they are overtaken by old age or struck down unexpectedly by sickness.

It was argued that the Society was not a charity at all, but a mere friendly society indistinguishable from the friendly

BENNETT J. 1938 FORSTER, *In re*. GELLATLY *v*. PALMER.

society which had to be considered by Hall V.-C. in *In re Clark's Trust.* (1)

It appeared from the rules of that society that it was one whose members were to provide by subscriptions and fines a fund to be distributed for their mutual benefit, in case of sickness, lameness or old age, and that poverty was not required to entitle a member to an allowance; and it was, therefore, held that that society was not a charitable institution: it was a mere businesslike association. The society in this case is quite different. Its purpose is to relieve ministers of religion, in case of old age, sickness or infirmity. Its funds are mainly derived from donations from non-members. It is not a mere businesslike association of members. Its purpose is to assist a particular kind of priest. Since that purpose in my judgment tends to advance religion, I hold it to be a charitable institution, and so distinguish the case from the case of *In re Clark's Trust.* (1)

Solicitors: *Gellatly, Son & Taylor; Wedlake, Letts & Birds, for Gidley & Wilcocks, Plymouth; Barlow, Lyde & Gilbert, for Ivens, Thompson & Green, Cheltenham; Gibson & Weldon, for New & Saunders, Evesham; The Treasury Solicitor.*

(1) 1 Ch. D. 497.

J. L. D.

In re DICKINSON'S SETTLEMENTS.

Considered. Re Dowie's Will Trusts. [1949] 1 Ch. 547

BICKERSTETH *v.* DICKINSON.

CROSSMAN J.
1938
July 21.

[1938. D. No. 1577.]

Marriage settlement—Power of appointment—Document dated prior to January 1, 1926*—Exercise of the power subsequent to that date—Maintenance—Whether s.* 31 *of the Trustee Act,* 1925, *applies—Trustee Act,* 1925 (15 *Geo.* 5, *c.* 19), *s.* 31, *sub-s.* 5.

Sect. 31 of the Trustee Act, 1925, confers on trustees power to pay or apply income for maintenance and other purposes where property is held by trustees "for any person for any interest what-"soever, whether vested or contingent."

Sect. 31, sub-s. 5, provides: "This section does not apply "where the document, if any, under which the interest arises "came into operation before the commencement of this Act."

Where a power of appointment is exercised, the document exercising the power and not the document creating the power is for the purpose of the above mentioned section the instrument under which the appointed interest arises, as a new interest is created by the appointment.

LIVERPOOL DISTRICT REGISTRY. ADJOURNED SUMMONS.

By a settlement (hereinafter referred to as "the husband's settlement") dated September 29, 1885, and made between George Dickinson (therein and hereinafter called "the husband") of the first part, Mary Florence Bickersteth (therein and hereinafter called "the wife") of the second part, and John Dickinson and Robert Alexander Bickersteth of the third part, certain personal estate was settled in trust for the wife during her life with remainder to the husband if surviving during his life and after the death of the survivor of the husband and the wife in trust for the children or remoter issue of the marriage in such manner and form in every respect as the husband and the wife might by any deed or deeds revocable or irrevocable jointly direct or appoint and in default of any such appointment as the survivor might in like manner or by will or codicil appoint and in default of and subject to any such appointment in trust for all or any the children or child of the marriage who being sons should attain the age of twenty-one

Reported by R. A. Yule, Barrister-at-law.

years or being daughters should attain that age or marry and if more than one in equal shares.

By a settlement (hereinafter referred to as "the wife's settlement") also dated September 29, 1885, and made between the husband of the first part, the wife of the second part, Edward Robert Bickersteth of the third part, and Robert Alexander Bickersteth and John Dickinson of the fourth part, certain personal estate was settled on (so far as is material) substantially similar trusts.

Neither settlement contained any express power of maintenance, but the husband's settlement contained a power of advancement expressly extending to appointed shares, and the wife's settlement contained a power of advancement limited to the shares of children of the marriage only.

There were three children of the marriage (all of whom attained the age of twenty-one years), namely :—(*a*) George Fryer Dickinson, who died on May 28, 1932 ; (*b*) Ronald Francis Bickersteth Dickinson, who was killed in action on June 16, 1915 ; (*c*) Alan Peile Dickinson, who was killed in action on June 1, 1918.

The said George Fryer Dickinson had four children, namely :—(*a*) Ethel Mary Hilary Dickinson, who predeceased him an infant and unmarried ; (*b*) The defendant Ronald Fryer Dickinson, who was born on September 25, 1916 ; (*c*) The defendant Alan Michael Dickinson, who was born on November 27, 1921 ; and (*d*) the defendant John Anthony Dickinson, who was born on May 31, 1929.

The wife died on October 17, 1922.

By a deed of appointment dated July 12, 1932, the husband (after revoking certain prior revocable appointments) in exercise of the power conferred on him by the husband's settlement and the wife's settlement appointed that subject to his own prior interests under the two settlements the trustees thereof should stand possessed of the trust estate : "Upon trust in equal shares for such of his three "grandchildren Ronald Fryer Dickinson Alan Michael Dickinson and John Anthony Dickinson (children of his deceased "son George Fryer Dickinson) as survive (the husband) and "attain the age of twenty-five years or are living at the "expiration of the period of twenty-one years from the death "of (the husband) and for the children who attain the age of "twenty-one years or are living at the expiration of the said "period of twenty-one years of any of the said grandchildren "of (the husband) who may predecease him or die before "attaining a vested interest such children to take if more than "one in equal shares the share which their parent would have "taken if living at the death of (the husband) and attaining "a vesting interest." Power to revoke such appointment was reserved but never exercised.

The husband died on February 9, 1934.

The plaintiffs, Edward Charles Bickersteth and Vivian Davidson Heyne, as trustees of the husband's settlement and the wife's settlement, took out an originating summons asking (inter alia) that it might be determined whether s. 31 of the Trustee Act, 1925, applied to the income of the contingent shares of the first three defendants (the grandchildren) in the trust funds subject to the trusts of the husband's settlement and of the wife's settlement or either of them or to any and what extent.

Edward Ackroyd for the plaintiffs. The normal doctrine is that an appointment is read into the document which creates the power. See Farwell on Powers, 3rd ed., p. 576, where it is stated: "Estates authorised to be created "under powers take effect, when created, as if they had been "inserted in the original instrument containing the power." On similar words in s. 44, sub-s. 5, of the Conveyancing Act, 1881, a similar question was raised which was set at rest by s. 6, sub-s. 2, of the Conveyancing Act, 1911, Wolstenholme's Conveyancing and Settled Land Acts, 10th ed., p. 118.

Spens K.C. and *Harold Brown* for the first three defendants and their mother. The grandchildren took no interest under the marriage settlements: their interests arose only under the appointment of 1932. A new estate was thereby created: see Farwell on Powers, 3rd ed., pp. 310 and 311, and *Duke of*

Northumberland v. *Commissioners of Inland Revenue.* (1) [He also referred to *In re Vizard's Trusts.* (2)]

[CROSSMAN J. cited *In re Rush. Warre* v. *Rush* (3) as supporting the view that the grandchildren's interest arose under the appointment.]

CROSSMAN J. [after referring to the marriage settlements and deed of appointment of 1932, continued :] The question that arises is the proper construction of s. 31 of the Trustee Act, 1925, and in particular the words of sub-s. 5, which reads : " This section does not apply where the instrument "if any under which the interest arises came into operation "before the commencement of this Act."

It is to be noticed that on substantially similar words in s. 44 of the Conveyancing Act of 1881, a similar doubt was expressed as to the meaning of the words " the instrument "under which the annual sum arises," and that doubt was set at rest by s. 6 of the Conveyancing Act, 1911. This does not, however, assist me in this case, as s. 6 of the Conveyancing Act, 1911, does not amount to a decision that the doubt as to the meaning of the words in s. 44 of the Conveyancing Act, 1881, was well founded.

It has been argued that estates created under powers are to be regarded as created by the instrument under which the powers arose. In support of that principle, Farwell on Powers, 3rd ed., p. 576, has been cited. The same learned author at pp. 310, 311, states that an appointment creates a new estate, using the words " the exercise of a power of "appointment divests . . . . the estates limited in default of "appointment and creates new estates, and that, too, whether "the property be real or personal." The last mentioned statement from Farwell on Powers was adopted as correct by Hamilton J. in *Duke of Northumberland* v. *Commissioners of Inland Revenue.* (4) The principle finds support in the case of *In re Rush. Warre* v. *Rush* (3), a case arising out of the Treaty of Peace Order, 1919.

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(1) [1911] 2 K. B. 343.
(2) (1866) L. R. 1 Ch. 588.
(3) [1922] 1 Ch. 302.
(4) [1911] 2 K. B. 343, 354.

In my judgment the interests of the three grandchildren of George Dickinson arose for the purpose of s. 31, sub-s. 5, of the Trustee Act, 1925, under the appointment made in 1932. I hold, therefore, that s. 31 applies to the contingent interests of those three grandchildren, and I will make a declaration accordingly.

Solicitors: *Hill, Dickinson & Co., Liverpool; Wilson, Cowie & Dillon, Liverpool.*

R. A. Y.

SIMONDS
J.

1938

July 12, 13.

In re MAVILLE HOSE, LIMITED.

[00366 of 1938.]

Company—Winding-up—Discovery and examination of witness—Order on director of another company to attend for examination and produce debentures and other documents—Whether company's documents are in possession of one director—Motion to discharge order as premature and oppressive—Discretion of Court—Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 214.

In the voluntary liquidation of the M. H. Company, the registrar, on the application of the liquidator ordered R., one of several directors of another company, C. M. T. Co., Ld., to attend for examination and to bring with him and produce to the court two debentures which had been issued by the M. H. Co. to the C. M. T. Co., a guarantee, a banker's pass book and bank statements and any other documents showing the state of account between the two companies and the payment of any moneys advanced to the M. H. Co. R. moved to discharge the order as being premature and oppressive:—

Held, that, without deciding whether one director of a company could properly be said to have the possession or custody of the company's documents, the order, so far as it directed the production of documents, was oppressive, and was one which in the exercise of the discretion of the Court under s. 214 of the Companies Act, 1929, ought not to have been made. R. must attend for examination and it would depend upon the results of the examination whether a further order for the production of any and what relevant documents ought properly to be made.

MOTION.

In September, 1931, Maville Hose, Ld., issued to Croft Twist Mill Co., Ld., a debenture to secure the sum of 2000*l*., and in January, 1932, another debenture to secure 4000*l*. On March 7, 1937, a resolution was passed for the voluntary liquidation of Maville Hose, Ld., and a provisional liquidator was appointed.

The following order was made by Mr. Registrar Stiebel on June 25, 1938, on the application of the liquidator of Maville Hose, Ld.: "G. Robinson of Forest Road Mansfield in the "County of Nottingham a director of the Croft Mill Twist Co. "Ld. is hereby ordered to attend at the chambers of the "Registrar, Companies (Winding-up), Carey Street, London "on Monday July 11 at 2.15 p.m. to be examined on the "part of the liquidator under the provisions of s. 214 of the "Companies Act 1929. (1) And the said G. Robinson is "required to bring with him and produce at the time and "place aforesaid the documents mentioned in the schedule "hereto and all other books papers deeds and other documents "in his custody or power in any wise relating to the above-"named company."

The schedule contained the following particulars: " Deben-"ture to secure 2000*l.* dated 24 Sept. 1931. Second debenture "to secure 4000*l.* dated 23 Jan. 1932. Guarantee given by "Maville Hose Ld. to Croft Mill Twist Co. dated 23 Jan. "1932. The bank pass book or bank statements of Croft "Mill Twist Co. Ld. or any other document showing the "payment of any moneys advanced to Maville Hose Ld. by "way of loan. All documents showing the state of account "between Croft Mill Twist Co. Ld. and Radford Manufacturing "Co. G.m.b.H. of Chemnitz. All documents relating to the "issue by Maville Hose Ld. of the debentures and guarantee "above-mentioned."

(1) The Companies Act, 1929, s. 214, provides as follows:— "(1.) The court may, at any time "after the appointment of a "provisional liquidator or the "making of a winding-up order, "summon before it any officer of "the company or person known "or suspected to have in his pos-"session any property of the "company or supposed to be "indebted to the company, or any "person whom the court deems "capable of giving informa-"tion concerning the promotion, "formation, trade, dealings, "affairs, or property of the com-"pany.

"(2.) The court may examine "him on oath concerning the "matters aforesaid, either by "word of mouth or on written "interrogatories and may reduce "his answers to writing and "require him to sign them.

"(3.) The court may require him "to produce any books and papers "in his custody or power relating "to the company, but, where he "claims any lien on books or "papers produced by him, the "production shall be without pre-"judice to that lien, and the court "shall have jurisdiction in the "winding-up to determine all "questions relating to that lien.

"(4.) If any person so sum-"moned, after being tendered a "reasonable sum for his expenses, "refuses to come before the court "at the time appointed, not having "a lawful impediment (made "known to the court at the time "of its sitting and allowed by it), "the court may cause him to be "apprehended and brought before "the court for examination."

G. Robinson now moved to discharge or vary the order as being oppressive and made without jurisdiction.

Roger Turnbull for the applicant. The registrar has made an order which he had no power to make. The Court can order the production of documents in the possession of Mr. Robinson and relating to the case. But these documents are not in his possession; they belong to the Croft Twist Mill Company, and he submits that as one of four directors he has no power to remove the documents from the company's office and bring them to London, at least not without the consent of the other directors, which has not been obtained.

A person affected by such an order as the present one has always the right to move the Court to discharge the order, and this was done in *In re London and Lancashire Paper Mills Co., Ld.* (1), a case under s. 115 of the Companies Act, 1862, which corresponds to s. 214 of the Act of 1929.

The order should have been qualified by asking for the production of the books and documents, if they were in the applicant's possession, but it was not qualified in any way. The order was both premature and oppressive; its object was to obtain information to enable the liquidator to take proceedings against the Croft Twist Mill Co., Ld., to invalidate these debentures. Some of the documents ordered to be produced are not material, and are privileged from discovery.

Sect. 214 gives extraordinary powers, and there is a wide discretion in the Court in exercising it. The authorities show clearly that an order such as the present may, if it is oppressive, be appealed from and discharged. See *In re North Australian Territory Co., Ld.* (2), *In re Great Kruger Gold Mining Co., Ld.* (3), *In re Pretoria Pietersburg Ry. Co., Ld.* (4) Certain dicta to the contrary in *In re Gold Co.* (5) have since been questioned: see Buckley on Companies at p. 458. The order in that case was for the attendance of witnesses, and did not require the production of documents.

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(1) (1888) 57 L. J. (Ch.) 766.
(2) (1890) 45 Ch. D. 87, 95.
(3) [1892] 3 Ch. 307.
(4) [1904] 2 Ch. 170.
(5) (1879) 12 Ch. D. 77.

J. B. Lindon for the liquidator. The order is objected to on two grounds: (1.) that there was no jurisdiction to make it, and (2.) that it is oppressive. But it is clear that the section is of an oppressive nature, because it enables a person to be called on to give information which may lead to the bringing of an action.

The cases cited with regard to discovery in an action have nothing to do with the present case. It is not suggested that the documents to be produced do not relate to the affairs of the company, or that the company, or its other directors, object to their production. It is admitted that the object of the order is to challenge the validity of these debentures. But, if the documents were produced and examined, the result might be that the liquidator would not take any proceedings to set them aside: see *Massey* v. *Allen* (1) and cases cited in Buckley on Companies, 11th ed., at p. 460: *Ex parte Leaver.* (2)

When the examination takes place, there are three grounds for objecting to the production of documents: (1.) that they are not material, (2.) that they are privileged, and (3.) that they might incriminate the party producing them, and these can all be urged at the proper time. The only way in which the Court can exercise its powers over a company is through a principal officer of the company, such as one of the directors, and he can be required to attend under s. 214. It cannot get production of documents from a company except by bringing before it the secretary or a director. A director of a company is bound to give the Court all the information in his possession or power concerning the company.

[SIMONDS J. It seems difficult to reconcile the decision in *Massey* v. *Allen* (1) with what was said subsequently, by the Court of Appeal, in *In re North Australian Territory Co., Ld.* (3)]

The object of the section is to enable a liquidator, whether in a voluntary or compulsory liquidation, to decide whether proceedings shall be commenced, or if already commenced, continued. The procedure arises from the paradox that a company has no body, and it is necessary to compel its officers to attend and give information.

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(1) (1879) 9 Ch. D. 164.
(2) (1884) 51 L. T. 817.
(3) 45 Ch. D. 87.

The applicant has not said in his affidavit that the documents of the Croft Twist Mill Co., Ld., are not in his power. The company is a private company, and the director has sufficient control to be able to produce them, if required. It would be inconvenient to require all the directors to attend and produce documents as to which only one director is being examined. The liquidator is not asking for any discovery which he could not get in an action. If the applicant has not got the documents in his possession or power, there is nothing oppressive in the order; he has only to attend and say so, and no attachment for disobedience would issue: see *R.* v. *Stuart* (1), *Crowther* v. *Appleby* (2), *Eccles & Co.* v. *Louisville and Nashville Railroad Co.* (3), *In re Emma Silver Mining Co.* (4), *Walburn* v. *Ingilby* (5), *Williams* v. *Ingram.* (6)

Roger Turnbull in reply. The applicant is fully entitled to come before the Court and test the validity of the order made on him. The documents are the confidential documents of the Croft Mill Twist Co., Ld., which is not a party to these proceedings. The applicant is not obliged to take the risk of being attached for disobedience to the order: see *Kearsley* v. *Philips.* (7)

SIMONDS J. Maville Hose Company, Ld., is a company in voluntary liquidation under a resolution passed on March 7 of this year. In the liquidation of that company the learned Registrar has made an order, to which I will presently refer, under s. 214 of the Companies Act, 1929. [His Lordship read s. 214, sub-ss. 1, 2 and 3, and continued:]

The learned Registrar has, as I say, made an order under the section, and it is an order based on a statement made by the liquidator, which is not revealed to the party against whom an order is sought, but is, of course, made in the utmost

(1) (1885) 2 Times L. R. 144.
(2) (1873) L. R. 9 C. P. 23, 28.
(3) [1912] 1 K. B. 135, 145.
(4) (1875) L. R. 10 Ch. 194.
(5) (1832–33) 1 My. & K. 61, 82.
(6) (1900) 16 Times L. R. 434.
(7) (1882) 10 Q. B. D. 36.

good faith by the liquidator of the company. The order is made against one Geoffrey Robinson, a director of a company called Croft Mill Twist Company, Ld. It is plain on the face of the order, and I need not refer to the statement for this purpose, that the object of the liquidator in seeking to examine Geoffrey Robinson under this section is to obtain information and, if necessary, to test the validity of a debenture or debentures of the company held by the Croft Mill Twist Company, Ld.

In those circumstances the Registrar has made an order by which Geoffrey Robinson, described as a director of Croft Mill Twist Company, Ld., is ordered to attend at the Chambers of the Registrar on a certain day at a certain time to be examined on behalf of the liquidator under the provisions of s. 214 of the Act. Against that part of the order no criticism is levelled here. It is clear that, when an order for examination is made under s. 214, the proper course for the proposed examinee is to attend and refuse to answer any questions which he thinks he ought not to be asked. The matter of his refusal can, if thought fit, be referred by the Registrar to the Court. The order goes on: " And the said Geoffrey Robinson is hereby "required to bring with him and produce, at the time and place "aforesaid, the documents mentioned in the schedule hereto, "and all other books, papers, deeds, writings, and other "documents in his custody or power in anywise relating to "the above-named company." Then the schedule contains a list of documents. First, a debenture to secure 2000*l.*, dated September 24, 1931; a second debenture, which is described; a guarantee given by Maville Hose, Ld., to Croft Mill Twist Company, Ld.; then: " The bank pass book "or bank statements of Croft Mill Twist Company, Ld., or "any other document showing the payment of any moneys "advanced to Maville Hose, Ld., by way of loan, in respect "of which the above-mentioned debentures were issued. All "documents showing the state of account between Croft Mill "Twist Company, Ld., and Radford Manufacturing Company "G.m.b.H. of Chemnitz. All documents showing or relating "to the circumstances of the issue and giving by Maville Hose, "Ld., of the debentures and guarantee above mentioned."

To that part of the order exception is taken by Geoffrey Robinson, and he moves this Court that the order, which I have stated, should be discharged or varied in so far only as it relates to the requisition to produce the documents which I have mentioned.

The objection is based on two main grounds: first, that the documents mentioned in the schedule are not, within the meaning of the schedule, documents in the custody or power of Geoffrey Robinson; and, secondly, that in any event the order is oppressive and as such ought not to be made in the discretionary jurisdiction of the Court under the sub-section. To that, answer is made by the liquidator, in the first place, that the procedure adopted by the applicant is wrong, that he ought not to move the Court to discharge the order, but that he ought to attend before the learned Registrar and, if he thinks fit, refuse to produce the documents, and say he does not produce them; and in the second place that the order has been properly made in the exercise of the jurisdiction.

I will deal first with the first part of the case. It is, as I have said, the correct procedure where a proposed examinee is ordered to attend, to attend and refuse to answer the questions which he thinks ought not to be asked. But in my view it is not right that he should be left with no other course than to attend before the Court and refuse to produce the documents which he has been ordered to produce. He ought not to be put in the peril of the Court finding that he has refused to obey a proper order of the Court. In effect Mr. Lindon, on behalf of the liquidator, has said: "If you think the order is not a proper one "you can disobey it, but you disobey it at your peril." That cannot be the right course. It appears to me that the right course for the proposed examinee, if an order of this kind is made, is to come to the Court and ask that it should be discharged so far as he claims that it is an improper order. I cannot think that, where there is an order made against him to produce certain books and do certain things, he should disobey the order, and risk committal or attachment if the Court finds it was a proper order which he ought to have obeyed. His proper course is to test, here and now, the validity of the order which he claims to have been improperly made; therefore, on that part of the case I think that the applicant is right in coming to the Court to seek to have the order discharged.

Is he, then, right in claiming that this is an order which ought not under s. 214, sub-s. 3, to have been made? In my view, he is right in so claiming. I do not propose in this case to determine the question, which may well be of some difficulty, whether a director of a company either in general or in any particular case can be said to have in his custody or power documents which belong to the company of which he is a director. I can see that there is a good deal to be said for or against that proposition, and I do not propose to discuss it. I think that, in the exercise of the discretion which the Court has under this section, an order directing a proposed examinee to bring a large number of documents before the Court should not, in the special circumstances of this case, be made. I have considered the statement of facts on which the learned Registrar made his order, and I do not think that he properly exercised his discretion in directing the proposed examinee to bring all these documents before the Court, at any rate, at this stage of the proceedings. I say "at this "stage of the proceedings," because it may well be that when the examinee attends before the Registrar for examination it will be right and proper, on certain answers being given by the examinee, for the Registrar to direct that certain documents should be produced. That cannot be determined until it is ascertained what answers the examinee gives, what answers he refuses to give, and whether he is sustained in his objection to answer these questions, it may be, by the Court. There are a number of questions to be determined, it appears to me, before it can be decided that a company against whom a hostile claim may be launched should be ordered to produce to the Court, for the purpose of their examination by the Court, a number of documents, a great number of which might be privileged from discovery.

It appears to me that in the circumstances of this case the order is oppressive, and it is very important in exercising a jurisdiction under s. 214, which is in any case an inquisitorial

SIMONDS J.

1938

MAVILLE HOSE, LD., *In re.*

jurisdiction, to be careful not to allow the section to be oppressive as between the company, on the one hand, and a third party, on the other hand, against whom it is contemplated that hostile action may be taken. Therefore, in the exercise of my discretion in this particular case, having read the statement on which the order was made, I shall discharge that part of the order which requires Mr. Geoffrey Robinson to bring with him for his examination the reports and documents which are referred to in the schedule to the order. But, in saying so, I neither prejudge what questions he may lawfully refuse to answer, nor what documents may on his answers properly be ordered to be produced. I discharge that part of the order and I direct that the liquidator pay to the applicant his costs of this application.

Solicitors: *Peacock & Goddard, for Elliot, Smith & Co., Mansfield, Notts.; Ashurst, Morris, Crisp & Co., for Taylor, Simpson & Mosley, Derby.*

H. L. L.

In re OCEANIC STEAM NAVIGATION COMPANY LIMITED.

[00464 of 1938.]

SIMONDS J.

1938

July 25, 26, 29.

Company—Scheme of arrangement with creditors—Proposed transfer of undertaking to new company for realization of assets and distribution—Scheme approved by creditors, but opposed by shareholders—Ultra vires—No jurisdiction to sanction—Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *ss.* 153, 154.

A company has no power to enter into, nor can the Court sanction, any arrangement or compromise with its creditors under ss. 153 and 154 of the Companies Act, 1929, which necessarily involves the doing of any act which is ultra vires the company, being in excess of its corporate powers as defined in its memorandum of association.

A company which was wholly insolvent proposed, and its creditors approved, a scheme which involved the transfer, in consideration of shares to be issued as fully paid to the creditors, of its entire undertaking and assets to a new company to be formed for the purpose of acquiring those assets and gradually realizing them. The company was then to be dissolved without winding-up. The objects of the company as stated in the memorandum of association did not include any power to sell or dispose of the company's undertaking. The scheme was opposed by shareholders on the grounds (1.) that it ignored the interests of the shareholders and was unfair to them; (2.) that it was ultra vires:—

Held that, in the circumstances, the scheme was not unfair to the shareholders, whose interests were now of no value; but that, the scheme being ultra vires, the Court had no jurisdiction to sanction it.

PETITION.

The petition was presented by the Oceanic Steam Navigation Company, Ld. (hereinafter called "the company"), under ss. 153 and 154 of the Companies Act, 1929, to obtain an order sanctioning an arrangement (involving a reconstruction of the company) between the company and its secured and unsecured creditors. The scheme was dated June 29, 1938.

The company was formed in 1869 under the Companies Act, 1862, as a company limited by shares. The objects of the company as set out in the memorandum of association (as altered by special resolution confirmed by order of the Court dated December 22, 1905) included the carrying on of a shipping business, the raising or borrowing of money on security or otherwise, the creation and issue of debentures and debenture stock, and the acquisition of shares in and the guaranteeing of the obligations of other companies carrying on a similar business. The capital of the company was 5,000,000*l.* divided into 5000 shares of 1000*l.* each, all of which were issued and fully paid up. The company had carried on business since its formation, but for many years past had made no profits, and at the present time was wholly insolvent. In 1932 the Royal Mail Steam Packet Company, together with the company and other associated companies, presented, and the Court sanctioned, a scheme of arrangement with its and their creditors, secured and unsecured, under which a moratorium was created, and the issue of deferred creditors' certificates entitling creditors to interest was provided for. No such certificates, however, had ever been issued, as the company had never had any available net earnings for payment of interest thereon. The moratorium created by the scheme of 1932 expired on December 31, 1934. In 1934 the company sold and transferred the whole of its fleet and other shipping assets to Cunard White Star, Ld., in consideration of the issue to it of fully paid shares in that company. It was therefore now a shareholding company only, except that it owned certain leasehold property in London and freeholds in Liverpool, in each case subject to mortgages.

Under the scheme the creditors of the company were divided into three classes, A, B and C. Creditors of class A, who were fully secured by a first charge on part of its shares in Cunard White Star, Ld., consisted only of the Commissioners of His Majesty's Treasury and the Ministry of Finance of Northern Ireland, and to them the approximate amount due was 188,444*l.* Class B consisted of partly secured creditors for loans advanced for the construction of new ships, and to these the amount due was 3,406,814*l.* Class C consisted of the remaining creditors, who were either originally unsecured or had realized their securities, or whose securities were now considered to be of no value, and to these the amount due was approximately 4,100,000*l.*

The assets of the company on December 31, 1937, were 3,800,000 shares in Cunard White Star, Ld., of the nominal value of 1*l.* each, of which 1,274,216 were subject to the above mentioned charge, certain leasehold property in London and freehold property in Liverpool subject to specific mortgages, and cash in the bank amounting to some 26,000*l.* The scheme proposed that a new company, to be called the O. S. N. Realization Company, Ld., should be formed to take over all the assets of the company, and from time to time to realize them to the best advantage. The realization company was to have a capital of 1,150,000*l.* divided into 300,000 A shares and 850,000 B shares of 1*l.* each. These shares were to be issued to the creditors, and were to carry no right to any dividend, but were to entitle the holders to have distributed to them the total assets available for distribution to members in a winding-up in certain proportions dependent upon the average net price obtained by the company for the above-mentioned 1,274,216 shares in Cunard White Star, Ld., to be acquired by the realization company under the scheme. Upon the scheme becoming operative all the debts and assets were to be transferred to the O. S. N. Realization Company, and the company was ultimately to be dissolved, but without winding-up. Part of the cash balance, namely, 15,000*l.*, was to be invested as a pension fund for the benefit of ex-employees and their dependants.

The scheme made no provision for any rights or interests of shareholders, these being now regarded as of no value whatever.

A meeting of the unsecured creditors of Class C was held, by order of the Court, on July 21, 1938, and the scheme was duly approved by resolution. The petition claimed that the scheme would be of greater benefit to the creditors of the company, secured and unsecured, than a winding-up by the Court.

Gordon Brown for the company, and the Commissioners of H.M. Treasury and the Ministry of Finance of Northern Ireland, supporting the petition.

SIMONDS J.
1938
OCEANIC STEAM NAVIGATION CO., *In re.*

F. R. Evershed K.C. and *Hon. Denys B. Buckley* for the International Mercantile Marine Company, Ld., shareholders in the company.

The scheme is one that ought not to be sanctioned by the Court. In the first place it is ultra vires the company to dispose of the undertaking and assets, unless there is express power to do so contained in the memorandum of association, and secondly, even if there was power to do so, the directors ought not to have approved the present scheme, as it is one which entirely disregards the interests of the shareholders.

The scheme is not one out of which the company can get any advantage. It is wholly insolvent, and ought to be wound up by the Court.

Up to quite recently the scheme as originally prepared was one which gave a small interest to the shareholders, and it is understood that that had been agreed to by the creditors. But the directors have struck out that part of the scheme and only the creditors can take any benefit under it. The scheme has also been presented to the Court for its sanction in very great haste.

On the first point, the Court will not approve a scheme for the disposal or sale of the entire undertaking of the company, unless there is express power to do so conferred by the objects clause of the memorandum. Here there is no such power. In most cases the question could not arise, for the modern form of objects clause usually contains such a power: see *Simpson* v. *Westminster Palace Hotel Co.* (1); *Featherstonhaugh* v. *Lee Moor Porcelain Clay Co.* (2) Sects. 153 and 154 of the Companies Act, 1929, are only a piece of machinery which enables the Court to validate a compromise which the company can otherwise enter into.

The duty of the directors is to the company, and not to its creditors, and, if only the interests of the creditors are considered, the directors are neglecting their duty.

[They also referred to *In re White Star Line, Ld.* (3)]

Gordon Brown in reply. The Court has power to sanction the scheme under s. 153, and under that section could sanction something which would otherwise be ultra vires the company: *Ashbury Railway Carriage Co.* v. *Riche* (1); *In re J. A. Nordberg, Ld.* (2)

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(1) (1860) 8 H. L. C. 712.
(2) (1865) L. R. 1 Eq. 318, 325.
(3) [1938] Ch. 458.

The Court can disregard the restrictions of the memorandum. It is no objection to the scheme that it provides for the transfer of the undertaking from the company to another company; that is authorized by s. 154. In cases of sales under s. 234 it is quite irrelevant whether there is power to sell in the memorandum or not: see *In re Tea Corporation.* (3)

[The following cases were also referred to: *In re Guardian Assurance Co.* (4) and *In re Anglo-Continental Supply Co., Ld.* (5)]

Cur. adv. vult.

1938. July 29. SIMONDS J. This is a petition by the Oceanic Steam Navigation Company, Ld., to obtain an order of the Court under ss. 153 and 154 of the Companies Act, 1929, sanctioning a written arrangement between the company and certain classes of its creditors. It is opposed by shareholders holding a very large number of shares whose opposition is based on two grounds: first, that the proposed arrangement is ultra vires the company and that the Court has no jurisdiction to sanction it under s. 153; and, secondly, that, if there is jurisdiction, it is a discretionary jurisdiction, which, in the circumstances, ought not to be exercised in favour of the petitioner.

I will deal with the second point first. The circumstances of the case are unusual. The company was, with a large number of other shipping companies, concerned in a scheme of arrangement under s. 153 of the Act which was sanctioned by the Court on June 24, 1932. The company was then, as it is now, hopelessly insolvent, and I am not concerned with the scheme except to observe that under clause 16 (F) and the schedule thereto the board of the company was thereafter

(1) (1875) L. R. 7 H. L. 653.
(2) [1915] 2 Ch. 439.
(3) [1904] 1 Ch. 12.
(4) [1917] 1 Ch. 431.
(5) [1922] 2 Ch. 723.

SIMONDS J.
1938
OCEANIC STEAM NAVIGATION Co., *In re.*

to consist exclusively of directors nominated by the creditors of the company, one by His Majesty's Treasury and the Government of Northern Ireland, one by the Bank of England, one by trustees for Debenture stockholders, and one by the company's bankers, with power for them to co-opt additional directors. Such directors were duly nominated and became, and are with directors co-opted by them, the directors of the company. As such directors they have, under art. 167 of the company's articles, all the powers of the company which are not by the articles or by statute expressly directed or required to be exercised by the company in general meeting. In that capacity they have formulated this scheme, as a result of which the shareholders not only take no benefit, but never can take any benefit, in the assets of the company. It is a scheme which, on the footing that only creditors of the company can have any interests therein, in effect provides for the distribution of the company's assets among several classes of creditors or individual creditors in a manner which they have severally approved and which I see no reason to think unfair. It is urged that the directors ought to have refused to call in aid the machinery of s. 153 to enable that to be done which is proposed to be done without the company being first put into liquidation, unless the creditors were prepared to concede something to the shareholders. It is indeed rightly pointed out that without the assistance of the company the creditors alone could not avail themselves of s. 153; they could at any moment put the company into liquidation, but since they have chosen the path of s. 153 without a previous liquidation, it is to be assumed that they would pay something to be allowed to take that path, and accordingly the directors should not have assisted them without exacting a price.

There is, I suppose, room for different views on the question whether on the facts of this particular case a refusal by the directors to assist the creditors, except on the footing of some benefit being given to the shareholders, would have borne any fruit. However that may be, the matter comes before me on the footing that the directors have thought fit to assist the creditors by putting forward a scheme for their benefit, and that scheme has been duly approved in the manner contemplated by the Act. It appears to me that I cannot, in the circumstances, properly refuse my sanction on the ground that there has been any impropriety in their action or any unfairness to the shareholders of the company. The jurisdiction under s. 153 of the Act and under the corresponding sections of earlier Acts has consistently been exercised without regard to the wishes of shareholders or a class of creditors who had no real interest in the assets of the company, and it would, I think, be in accordance with that principle if I declined to give effect to the contentions of the shareholders under this head.

I now turn to the question of the jurisdiction of the Court to sanction this scheme, and for the consideration of this question it is necessary to refer to two points: first, that the company has, as I hold, on the true construction of its memorandum of association, no power as a going concern to sell and dispose of its whole undertaking; secondly, that the scheme provides for the sale and transfer of the whole of the assets and undertaking of the company to a new company to be formed for the purpose.

It is, I think, plain that the company could not, apart altogether from the question of binding dissentient creditors or shareholders, do that which it is proposed to do unless s. 153 can be invoked; see, for example, *Simpson* v. *Westminster Palace Hotel Co.* (1) The question then is whether, under s. 153, the company can make and the Court sanction an arrangement which is in excess of the corporate powers as defined by the memorandum. There is nothing in the language of s. 153 which even remotely suggests such a conclusion. It contemplates a compromise or arrangement between a company and its creditors or any class of them or its members or any class of them, and provides machinery whereby such a compromise or arrangement may be made binding on dissentient persons by an order of the Court. I find nothing here which would indicate that the company can effect an arrangement

(1) 8 H. L. C. 712.

SIMONDS J.
1938
Oceanic Steam Navigation Co., In re.

which would be otherwise ultra vires if the Court will give its sanction under s. 153.

Rights which are conferred by the memorandum of association on classes of shareholders may, no doubt, be overridden by a scheme under s. 153, because that is expressly provided by sub-s. 5, which is the lineal descendant of s. 45 of the Act of 1908. But no case was cited to me by the counsel for the company where an act otherwise ultra vires the company had been validated as part of a compromise or arrangement under s. 153. He did not, as I understood him, dissent from the view that a company could not, under s. 153, embark on some new object which was outside the scope of its memorandum, but contended that the disposal by the company of its whole undertaking and assets stood in some special category of its own, and though unauthorized by the memorandum might yet be effected under s. 153. I am unable to give effect to such a distinction. In *In re Guardian Assurance Co.* (1) Younger J., whose judgment was not overruled or adversely commented on on this point, said: "The section accordingly has no application to an arrangement "which is ultra vires the company, nor to an arrangement "of a kind which can only be effected in a prescribed "way, e.g., a reduction of capital, or a reconstruction under "s. 192."

He was referring to s. 120 of the Act of 1908, but his observations apply mutatis mutandis to s. 153 of the Act of 1929. I have been able to find no case in which the judgment of Younger J. on this point has been challenged. Later cases, such as *In re Anglo-Continental Supply Co., Ld.* (2), do not seem to me to touch the point which his Lordship was discussing or which I have to determine. It is indeed a cardinal principle that a company's corporate powers are defined and limited by its memorandum of association, and that its memorandum can only be altered in the manner prescribed by the Act itself. It would be strange if by a side wind under s. 153, without observing the particular prescription of the Act with regard to alterations, new powers

(1) [1917] 1 Ch. 431, 441.

(2) [1922] 2 Ch. 723.

SIMONDS J.
1938
OCEANIC STEAM NAVIGATION CO., *In re.*

could be conferred on a company, and the contention is more forcible when it is remembered that the new power proposed by this scheme to be conferred on the company—namely, to sell or dispose of the whole or any part of the undertaking—is a power for the creation of which by alteration of the memorandum s. 5, sub-s. 1 (*f*), of the Act of 1929 makes express provision.

Counsel for the company pressed on me a course of practice in this Court which, he said, would justify my sanctioning this scheme. But such inquiries as I have made, in the short time at my disposal, have not produced any case in which the Court has sanctioned a scheme involving the company in the exercise of a corporate power, whether by the sale of its undertaking or otherwise, which apart from the scheme would not be intra vires. On the other hand, I have found at least one case where, a proposed scheme involving a sale of the undertaking, and the company's memorandum not involving a power to do so, the petition to the Court to sanction the scheme contained a prayer to confirm an alteration of the memorandum so as to include the power, such prayer being supported by proof of a special resolution to that effect previously passed. No doubt in the great majority of cases where a company wishes, while still a going concern, to dispose of its undertaking as part of a scheme under s. 153, no question arises, for the memorandum of association nowadays commonly contains such a power. But if it is not there and a sale of the undertaking is therefore ultra vires the company, I must decline to sanction a scheme of which such a sale forms an integral part. In taking this course I am, I think, acting in accordance with the judgment of Younger J. and within the plain meaning of the statute.

Accordingly, I refuse the petition and I shall make no order on it, except that the company do pay the costs of the opposing shareholders, to whom I am indebted for bringing the question of jurisdiction to my notice.

With regard to the action, there came before me with the petition a motion in an action of Sidney Joseph Jackson on behalf of himself and all other shareholders of the Oceanic

BIBL. LONDIN

SIMONDS J.

1938

Oceanic Steam Navigation Co., *In re.*

Steam Navigation Company against the company and certain men who were directors of the company. By that motion the plaintiffs asked that the company, its directors and agents, might be restrained by injunction from proceeding with the scheme of arrangement or taking any further step in the proceedings, and asking for certain alternative relief. It is unnecessary for me, having refused the petition, to say anything further on that motion. In my view, the plaintiffs were right in the view which they took as to the competence of the company to enter into such an arrangement at all. I shall make no order on the motion, except that costs be costs in the action.

Solicitors: *Linklaters & Paines; William A. Crump & Son.*

H. L. L.

In re SHARPE'S DEED OF RELEASE.

MORTON
J.

1938
June 29, 30.

SHARPE AND FOX *v.* GULLICK AND OTHERS.

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[1937. S. 4007.]

Settlement—Charge of annual sums—Land devised subject to charges by wills of settlor and his son and grandson—Compound settlement—Trust for sale in grandson's will only—Same persons trustees of wills of son and grandson—No trust for sale of whole of property—Settled Land Act, 1925 (15 *Geo.* 5, *c.* 18), *s.* 1, *sub-s.* 1 (*v.*) ; *s.* 20, *sub-s.* 1 (*viii.*) ; *s.* 31, *sub-s.* 1 ; *s.* 117, *sub-s.* 1 (*xxx.*)—*Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *s.* 205, *sub-s.* 1 (*xxix.*)—*Law of Property* (*Amendment*) *Act,* 1926 (16 & 17 *Geo.* 5, *c.* 11), *Schedule.*

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Under a deed of release dated March 10, 1818, certain property was limited upon trusts (inter alia) to pay from its rents and profits 1000*l.* a year for 1000 years, to be held upon trusts to be declared by a deed executed the next day, March 11, 1818. The property was subject also to a covenant by its owner, in a marriage settlement dated March 2, 1830, for the payment of 400*l.* a year for 500 years. The owner died in 1863, leaving the property to his son in fee simple, subject to the annuities. The son devised it to trustees in trust for his son (the owner's grandson) absolutely, subject to further annuities: and the grandson died in 1917, having devised all his estate on trusts for sale, investment of the proceeds of sale and payment of a legacy and an annual charge; and he left the residue in trust for his son (the owner's great-grandson) absolutely. Eventually those who were trustees of the son's will (one of whom was the great-grandson) were at the same time trustees of the grandson's will.

This summons (on which, as amended during the hearing, the trustees of the wills were plaintiffs) asked (inter alia) whether the property was settled land within the meaning of the Settled Land Act, 1925, as amended by the Law of Property (Amendment) Act, 1926, under a compound settlement consisting of all or any of the deeds and wills; if it was, whether the plaintiffs were Settled Land Act trustees and statutory owners under the compound settlement; if it was not, whether it was land held on trust for sale within the meaning of s. 2, sub-s. 2, of the Law of Property Act, 1925, as amended by the Law of Property (Amendment) Act, 1926; if necessary, that the plaintiffs might be appointed Settled Land Act trustees of the compound settlement or, alternatively, might be approved as trustees for sale of

MORTON J.
1938
SHARPE'S DEED OF RELEASE, *In re.*
SHARPE AND FOX *v.* GULLICK.

the property under the Law of Property Act, 1925, as amended by the Law of Property (Amendment) Act, 1926; whether the legal estate in fee simple in the property vested in the plaintiffs as trustees of the son's will; and whether it ought to be vested in them by a proper conveyance or vesting instrument as statutory owners under the compound settlement, or as trustees for sale, or on any trusts:—

Held, (1.) that the effect of the marriage settlement was to create, not a legal rentcharge, but an active trust for the payment of an annual sum: and that those to whom the annual sum was payable had not a legal estate by virtue of the Statute of Uses, the settlement creating only an equitable interest in it:

(2.) that the plaintiffs, as trustees of the son's will, held the property, first, on trust to pay annually the 1000*l.* payable under the deed of release and the 400*l.* payable under the marriage settlement, and secondly, to pay the annuity under the will and, subject thereto, in trust for the grandson's estate: and that the plaintiffs did not, by reason merely of their happening to be trustees of the wills of the son and the grandson, hold the property on trust for sale within the meaning of s. 1, sub-s. 7, of the Settled Land Act, 1925, a sub-section introduced by the Law of Property (Amendment) Act, 1926, because, had the trustees of the grandson's will been, at the date of the summons, persons not also trustees of the son's will, a trust for sale would not have been included in the trusts on which the trustees of the son's will held the legal estate in the property, and the trustees of the grandson's will would have held on trust for sale only the beneficial interest in the property given by the son's will to the grandson:

In re Parker's Settled Estates [1928] Ch. 247 (in which the interpretation of the phrase "immediate binding trust for sale" adopted by Tomlin J. in *In re Leigh's Settled Estates* [1926] Ch. 852 and *In re Leigh's Settled Estates* (*No.* 2) [1927] 2 Ch. 13, was not followed) and *In re Norton* [1929] 1 Ch. 84, considered and followed:

(3.) that the settlement under which the property was settled at the date of the summons was a compound settlement comprising the deed of release, the marriage settlement and the wills of the son and grandson, but not the deed of March 11, 1818, declaring the trusts of the annuity of 1000*l.*:

(4.) that the plaintiff who was the great-grandson was not a person having the powers of a tenant for life within the meaning of the definition in s. 20, sub-s. 1 (viii), of the Settled Land Act, 1925:

In re Astor [1922] 1 Ch. 364, followed.

(5.) that the plaintiffs were not trustees of the compound settlement for the purposes of the Settled Land Act:

(6.) that the legal estate was vested in the plaintiffs as trustees of the son's will and (an order having been made appointing the plaintiffs trustees of the compound settlement) ought to be vested in them as statutory owners by a vesting instrument.

ADJOURNED SUMMONS.

This summons was issued for the determination of questions raised in order to clear the title to an estate called the Hoxton Estate. The Hoxton Estate was at the date of the summons comprised in or affected by the following instruments: a deed of release, dated March 10, 1818, and creating a trust out of the rents and profits to pay a yearly sum of 1000*l.* to named trustees for a term of 1000 years; a deed executed on the following day, March 11, 1818, which declared the trusts of that sum; a marriage settlement dated March 2, 1830, executed by James Birch Sharpe (hereinafter called "the owner"), who, under the deed of release, became the owner of the estate, and (inter alia) containing a covenant by the owner to stand seised of the estate upon trust to pay out of the rents and profits a yearly sum of 400*l.* for 500 years; the will, dated January 13, 1864, of the owner's son, William Henry Sharpe Sharpe senior (hereinafter mostly called "the son"), who died on February 15, 1867, having been left the property, subject to the annuities of 1000*l.* and 400*l.*, under the will of his father, the owner, and having by his own will devised it to his trustees in trust, subject to further annuities, for his son, James William Sharpe, the owner's grandson (hereinafter mostly called "the grandson"); and the will, dated March 11, 1917, of the grandson, who died on August 10, 1917, having by his will devised all his estate to his trustees on trusts for sale and investment and after providing for certain payments to hold the residue of the trust premises in trust for his son (the owner's great-grandson) absolutely.

When the summons came on for hearing there was only one plaintiff—namely, Mr. William Henry Sharpe Sharpe, the owner's great-grandson: and he and the first defendant to the summons, Mr. Arthur Wingrove Fox, were then trustees of the wills of the son and grandson. During the hearing the summons was amended by removing the first defendant's name from the record as a defendant and adding him as a plaintiff.

There were five defendants to the summons—namely, Mr. Francis William Gullick and the Reverend Edward

William Taylor Jones, the two trustees for the time being of the deed of March 11, 1818; the Royal Exchange Assurance, entitled to receive for the time being the yearly sum of 400*l.* under the marriage settlement; Miss Edith Ella Sharpe, an annuitant under the son's will, and Mrs. Ellin Mary Caryll Usborne, an annuitant under the grandson's will.

The summons raised the following questions:—

(1.) Whether the Hoxton Estate was settled land within the meaning of the Settled Land Act, 1925, as amended by the Law of Property (Amendment) Act, 1926, under a compound settlement consisting of the deeds and wills, or of some and if so which of them;

(2.) if the answer to question 1 was in the affirmative, whether the plaintiffs were trustees for the purposes of the Settled Land Act, 1925, and statutory owners under the compound settlement;

(3.) if the answer to question 1 was in the negative, whether the Hoxton Estate was land held on trust for sale within the meaning of s. 2, sub-s. 2, of the Law of Property Act, 1925, as amended by the Law of Property (Amendment) Act, 1926;

(4.) if necessary that the plaintiffs might be appointed trustees of the compound settlement for the purposes of the Settled Land Act, 1925, or, alternatively, might be approved as trustees for sale of the Hoxton Estate under the Law of Property Act, 1925, as amended by the Law of Property (Amendment) Act, 1926;

(5.) (i.) whether the legal estate in fee simple in the Hoxton Estate was vested, in the events which had happened, in the plaintiffs as trustees of the son's will or any and if so what other person or persons;

(ii.) whether the legal estate ought to be vested by a proper conveyance or vesting instrument in the plaintiffs as statutory owners under the compound settlement, as trustees for sale, or on any and what trusts;

(iii.) generally, that directions might be given, so far as necessary, how title should be made to the Hoxton Estate for the purposes of sale, mortgage, or otherwise.

The facts are fully stated in his Lordship's judgment.

MORTON J.

1938

SHARPE'S DEED OF RELEASE, *In re.*

SHARPE AND FOX *v.* GULLICK.

G. P. Slade for the plaintiffs. The true view is that the land is settled land held under a compound settlement and that the plaintiffs are trustees of the compound settlement for the purposes of the Settled Land Act, 1925, and are therefore entitled to deal with the whole estate and make a good title to a purchaser, subject to first executing a vesting instrument in their own favour. If that is wrong, it must follow that the land is held on trust for sale. The trust for sale, however, arises only under the grandson's will and is not able of its own force to override the annuities. It is thus undesirable to leave the matter there: and the plaintiffs therefore ask the Court to carry the matter a stage further by appointing them trustees for sale, thereby enabling them to override the prior charges. Also, if the Court takes the view that there is a settlement but that there are no trustees of it, the Court will be asked to appoint the plaintiffs to be trustees of it. Prima facie all three of the first three instruments in the present case would come within the definition of "settlement" in s. 1, sub-s. 1, of the Settled Land Act, 1925, as being instruments by which the land is "charged" within the meaning of s. 1, sub-s. 1, para. (v.), of the Act.

It would seem that, if the Act stopped there, there would be no doubt that the land was settled land; but the difficulty arises from s. 1, sub-s. 7, which was introduced by the Schedule to the Law of Property (Amendment) Act, 1926. The expression "trust for sale" is defined in s. 117, sub-s. 1 (xxx.), together with the expressions "trustees for sale" and "power to postpone a sale," all three being defined by reference to the Law of Property Act, 1925, where the definitions are in s. 205, sub-s. 1 (xxix.).

The difficulty that has been felt is as to the true meaning of "immediate binding trust for sale." Tomlin J. in *In re Leigh's Settled Estates* (1) took the view that a trust for sale could not be an "immediate binding trust for sale" unless it could override all other interests in the land. Romer J. in *In re Parker's Settled Estates* (2) held that it could if the whole legal estate in the land was held on trust for sale.

(1) [1926] Ch. 852.

(2) [1928] Ch. 247.

In the present case, it will not be necessary for the Court to decide between the two views, because, at the material date—namely, January 1, 1926—even assuming that Romer J.'s view is right, it would not be correct to say that here the whole legal estate in the property was held on trust for sale. Here not only was there in fact no conveyance, but it would not have been proper for the trustees of the son's will to convey to the trustees of the grandson's will without the annuitant's consent. In cases, at any rate, where the legal estate is outstanding in trustees who hold it in order to provide for some such charge as this, there cannot be an immediate binding trust for sale, because there can be nothing to take it out of s. 1, sub-s. 1 (v.), of the Settled Land Act, 1925, which makes it settled land. The views of Tomlin J. in *In re Leigh's Settled Estates* (1) are quite clear, and, if the matter rested there, that in itself would be sufficient to decide that in the present case the land is settled land ; but in *In re Parker's Settled Estates* (2) Romer J. did not follow Tomlin J.'s interpretation, in *In re Leigh's Settled Estates* (1), of the phrase "immediate binding trust for sale." In *In re Leigh's Settled Estates* (*No.* 2) (3) (Tomlin J. having already decided in *In re Leigh's Settled Estates* (1) that the land was not subject to an "immediate binding trust for sale," by which was meant a trust for sale immediately exercisable so as to overreach all prior equitable charges) the trustees of the settlement came to the Court to be approved for the purposes of sale. It was held that there was no need for any further approval of them by the Court, as they had already been approved when the settlement was made. At the date of the case s. 2, sub-s. 2, of the Law of Property Act, 1925, had been substantially amended, and Tomlin J. decided that, by virtue of it as so amended, the land was subject to an "immediate binding "trust for sale," and was not settled land within the Settled Land Act, 1925. In *In re Parker's Settled Estates* (2) Romer J., although he took the view that it was not necessary to be able to overreach all prior equitable interests, did come to the conclusion that in that case there was no immediate binding trust for sale. In *In re Norton* (1) he again followed the view which he had expressed in *In re Parker's Settled Estates.* (2)

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(1) [1926] Ch. 852.
(2) [1928] Ch. 247.
(3) [1927] 2 Ch. 13.

In the present case, whatever view the Court takes of the law, on the facts there must be a settlement, because there is no evidence of the legal estate's ever having reached the trustees of the grandson's will, and it could not have done so without the concurrence of the annuitant under the son's will. If that view is right, and the legal estate passed to the trustees of the son's will, the trust for sale is still incapable of overriding prior equities, and Tomlin J.'s decisions in *In re Leigh's Settled Estates* (3) and *In re Leigh's Settled Estates* (*No.* 2) (4) ought to be followed in preference to Romer J.'s dicta to the contrary in *In re Parker's Settled Estates* (2) and *In re Norton.* (1)

On the question whether, if there is a compound settlement, the plaintiffs are trustees of it, it would appear that there is no tenant for life under the settlement: thus, the trustees of the settlement have the powers of a tenant for life under s. 23, sub-s. 1, para. (*b*), of the Settled Land Act, 1925. The relevant sections of the Act as to trusteeship are ss. 30 and 31. The question of compound settlements is dealt with more particularly in s. 31, and the plaintiffs in the present case obtain their trusteeship by the joint effect of the two sections. Sect. 31 is obviously intended to deal with a case where there is a compound settlement created by a number of instruments, but there are no trustees appointed by the earlier instruments. The words which present difficulty are "Where there are "trustees for the purposes of this Act of the instrument under "which there is a tenant for life or statutory owner" in the amendment to sub-s. 1 contained in the Schedule to the Law of Property (Amendment) Act, 1926. The plaintiffs are trustees of the grandson's will, which is one of the instruments creating the compound settlement.

In the present case there is a statutory owner because, there being no other tenant for life and there being a compound settlement, somebody must have the powers of a tenant for life, and the only people who can have them are the trustees of the grandson's will. The land is settled land, and the plaintiffs are trustees for the purposes of the Settled Land Act, 1925 : or, if they are not, the Court is asked so to appoint them.

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(1) [1929] 1 Ch. 84.
(2) [1928] Ch. 247.
(3) [1926] Ch. 852.
(4) [1927] 2 Ch. 13.

J. M. Lightwood for the trustees of the deed of March 11, 1818. *In re Leigh's Settled Estates* (1) cannot be followed. The Court must follow *In re Parker's Settled Estates* (2) and *In re Norton.* (3) Assuming that the whole legal estate is in the trustees, whether for sale or otherwise, the question is whether the trust for sale is operative so as to displace the settlement, notwithstanding the equitable charges. That point is left undecided by *In re Parker's Settled Estates* (2) and *In re Norton.* (3) So far as can be seen, the only outstanding legal estate in the present case is the rentcharge under the settlement of 1830.

H. Lloyd Williams for the Royal Exchange Assurance. The settlement of 1830 creates a legal rentcharge under the Statute of Uses : see Williams on Real Property, 19th ed., pp. 171 and 419. That rentcharge is created for the term of 500 years, and the residue of the term is in the trustees of the settlement : and when those trustees assigned the annuity, and the covenant to secure it, to the Royal Exchange Assurance, the legal rentcharge also was secured.

[MORTON J. It is desirable that I should deal first with the question whether this is or is not a legal rentcharge.]

Hon. B. L. Bathurst for the annuitants. In the marriage settlement the trust is not " for " certain persons, but " to pay " certain persons. The Court may have a difficulty in finding that there is a legal rentcharge here, although the annuitants would like the Court so to hold.

G. P. Slade. In one sense it would assist the trustees if this could be held to be a legal rentcharge, for then there would be no doubt that the land was settled land. But

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(1) [1926] Ch. 852.
(2) [1928] Ch. 247.
(3) [1929] 1 Ch. 84.

Mr. Lloyd Williams is paving the way to an argument, not only that the land is settled land, but that the trustees cannot override the Royal Exchange Assurance's annuity. The trustees therefore submit that no legal rentcharge was created.

MORTON J. I hold that the deed of 1830 does not create a legal rentcharge. Mr. Slade, you will proceed with your argument on that footing.

G. P. Slade. I approach the matter on the footing that it creates an equitable rentcharge, and that the Court prefers *In re Parker's Settled Estates* (1) to *In re Leigh's Settled Estates.* (2) In order that the land may be held on trust for sale, the legal estate must be subjected to a trust for sale so that the trustees are entitled and bound to sell the whole legal estate. If the trustees of the grandson's will were not the same persons as the trustees of the son's will, they would not be entitled to require the trustees of the son's will to convey any legal estate at all. Therefore, the mere fact that these persons have become trustees of both wills cannot create a trust for sale. That is very much borne out by *In re Norton.* (3) It is abundantly plain that not merely must there be a vesting of the legal estate in trustees for sale, but that the legal estate must be subject to a trust for sale. The Court has not that position in the present case.

Hon. B. L. Bathurst. So far as the question whether the land is settled land or is subject to a trust for sale is concerned, the annuitants desire to support the trustees' argument that it is subject to a compound settlement. But there is another point—namely, where the legal estate is at the moment. It is possibly in the trustees of the son's will, the plaintiffs on the summons: see s. 20, sub-s. 1 (viii.), of the Settled Land Act, 1925. Assuming that the Court holds that the land is not subject to an immediate binding trust for sale, the plaintiffs are persons entitled to the income of the land until sale of the land. Where there is a section of this nature, open to two possible constructions, the Court will incline to the construction which leads to the most reasonable result.

(1) [1928] Ch. 247.
(2) [1926] Ch. 852.
(3) [1929] 1 Ch. 84.

MORTON
J.
1938
SHARPE'S DEED OF RELEASE, *In re.*
SHARPE AND FOX *v.* GULLICK.

H. Lloyd Williams. So far as the Royal Exchange Assurance is concerned, the question whether the land is subject to a compound settlement is really academic because, whether it is held to be so or not, it will be contended on the plaintiffs' behalf that the Royal Exchange Assurance's interest is overreached.

J. M. Lightwood referred to Wolstenholme and Cherry's Conveyancing Statutes, 12th ed., vol. ii., p. 942, and to *In re Leigh's Settled Estates* (*No.* 2). (1) In the present case there is no legal estate outstanding: there are only equitable charges. Therefore the land is held on trust for sale and has ceased to be settled land. That is the short point. The legal estate was in the trustees of the son's will, to hold on certain trusts which are subsisting. They are also trustees of the grandson's will. It is submitted that they become trustees for sale subject to the prior charges, and also to the only outstanding equitable interest under the son's will.

MORTON J. On the view which I have formed in this case, I do not think it is necessary for me to reserve my judgment.

The first question asked by the summons is, " whether the "land and premises known as the Hoxton Estate comprised "in or affected by the above mentioned deeds and wills or "some of them are settled land within the meaning of the "Settled Land Act, 1925 (as amended by the Law of Property "(Amendment) Act, 1926) under a compound settlement consisting of the above mentioned deeds and wills or of some and if "so which of them."

The history of the Hoxton Estate is as follows. On March 10, 1818, a settlement (the deed of release) was made between William Sharpe and Rebecca Sharpe of the first part, Elizabeth Sharpe of the second part, James Birch Sharpe (the owner) of the third part, and Robert Davies of the fourth part. After recitals of the title to the property it was witnessed as follows: " The said William Sharpe and Rebecca Sharpe "his wife James Birch Sharpe and Elizabeth Sharpe by and "with their mutual consent and approbation testified by their

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(1) [1927] 2 Ch. 13.

"respectively being parties to and sealing and delivering these "presents have and each and every of them hath granted "bargained sold released appointed and confirmed and by these "presents do and each and every of them doth grant bargain "sell release appoint and confirm unto the said Robert Davies "(in his actual possession now being by virtue of a bargain "and sale to him thereof made by the said William Sharpe "and Rebecca Sharpe his wife James Birch Sharpe and "Elizabeth Sharpe by an indenture bearing date the day next "before the day of the date and executed before the execution "of these presents for the term of one whole year to be computed "from the day next before the day of the date of the said "indenture of bargain and sale and by force of the statute "made for transferring uses into possession) and his heirs "all that piece or parcel of land or ground. . . . ." Then follows a description of the Hoxton Estate. The habendum is in the following terms: " To have and to hold the said "piece or parcel of land or ground . . . . unto the said Robert "Davies and his heirs " (I now omit certain immaterial portions of the deed) " to the use of the said James Birch Sharpe his "heirs and assigns for ever nevertheless upon the trusts and "to and for the intents and purposes hereinafter expressed or "declared of and concerning the same." Then follow certain portions of the deed which I need not read, but the portion which declares the trusts begins as follows: " as to the estate "of the said James Birch Sharpe his heirs and assigns for "ever Upon the trusts and to and for the intents and "purposes hereinafter expressed or declared of and concerning "the same (that is to say). . . . ." Then follow certain trusts which have long since ceased, and the only subsisting trust is in the following terms: " and upon this further trust "that in case the decease of the survivor of them the said "William Sharpe and Rebecca Sharpe his wife shall happen "before the said 25th day of December 1821 then that the "said James Birch Sharpe his heirs and assigns shall from and "after the said 25th day of December 1821 or in case the "decease of such survivor shall happen after the same 25th "day of December 1821 then that he and they do and shall "from and after the decease of such survivor and thenceforth "for the term of 1000 years to be computed from the said "25th day of December 1821 or the decease of such survivor "whichever shall last happen by and out of the said residue "which shall from time to time remain of the monies to be "received by way of fines or premiums on the demising "granting or letting or to arise from the rents and profits of "the said hereditaments and premises as aforesaid pay one "annual sum of 1000*l.* of lawful money of Great Britain unto "them the said James Birch Sharpe Robert Davies and "William Ingle their executors administrators and assigns by "quarterly payments." I omit certain immaterial words. The deed proceeds: "And it is hereby declared that the "said James Birch Sharpe Robert Davies and William Ingle "their executors administrators and assigns shall stand and "be possessed of and interested in the said annual sum of "1000*l.* upon the trusts to and for the intents and purposes "and with under and subject to the powers provisoes agree-"ments and declarations expressed or declared and contained "of and concerning the same for the benefit of the said "Elizabeth Sharpe and her children or husband being her "appointee in and by the said indenture bearing date the day "next after the day of the date of these presents." The indenture there referred to was a deed of March 11, 1818, which I mention hereafter. I do not think I need read any other portion of the deed of release.

The result is that the legal estate in fee simple was vested in the owner, and that the only trust imposed upon the owner which is still subsisting is a trust for the payment of the sum of 1000*l.* a year for the term of 1000 years. Nobody has contended before me that this trust created anything other than an equitable interest.

The next document in date is the document of March 11, 1818, which contains the trusts upon which the 1000*l.* a year is to be held. The defendants Gullick and Jones are the present trustees of this document. I do not think it is material for the purpose of this case to read that document or to refer to the trusts thereof.

By a deed dated March 2, 1830 (the marriage settlement), made between the owner of the first part, Thomas Kelly of the second part, the Reverend Anthony Plimley Kelly, the Reverend Walter Kelly and George Samuel Heales of the third part, the owner covenanted in the following terms: "In "pursuance of the said agreement"—that is an agreement in contemplation of marriage—"and in consideration of the "said intended marriage he the said James Birch Sharpe "doth hereby for himself his heirs and assigns covenant "promise and declare with and to the said Anthony Plimley Kelly "Walter Kelly and George Samuel Heales their executors "administrators and assigns that in case the said intended "marriage shall take effect within six calendar months from "the date hereof he the said James Birch Sharpe his heirs and "assigns shall and will from and after the solemnization thereof "for during and unto the full end and term of five hundred "years to be computed from the day of the date of these "presents stand seised of the piece or parcel of ground "messuages buildings and other hereditaments hereinbefore "described with the appurtenances" (I now omit certain immaterial portions of this deed) "in trust by and out of the "monies to be received for fines or premiums on the demising "granting or letting or to arise from the rents and profits of "the said hereditaments and premises or by other means that "may be deemed expedient to pay one annual sum of four "hundred pounds of lawful money of Great Britain and "Ireland unto them the said Anthony Plimley Kelly Walter "Kelly and George Samuel Heales their executors administra-"tors and assigns by equal quarterly payments" on the days specified. The hereditaments and premises therein referred to are the Hoxton Estate. Then there follows a covenant by the owner in the following terms: "James "Birch Sharpe his heirs executors and administrators or some "or one of them shall and will from and after the solemnization "thereof for during and unto the full end and term of five "hundred years to be computed from the day of the date of "these presents well and truly pay or cause to be paid the "said annual sum of four hundred pounds unto the said

"Anthony Plimley Kelly Walter Kelly and George Samuel "Heales their executors administrators and assigns at the "times and in manner hereinbefore mentioned for payment "thereof without any deduction whatsoever." I understand there is no dispute that the intended marriage did take place within six calendar months from the date of the deed.

It has been contended by Mr. Lloyd Williams, for the Royal Exchange Assurance, that the effect of the passages in that deed which I have read was to create a legal rentcharge. I cannot accept that contention. The trusts upon which the owner covenants that he will stand seised of the Hoxton Estate are " by and out of the monies to be received for fines "and premiums," and so on, " or to arise from the rents and "profits of the said hereditaments and premises or by other "means that may be deemed expedient to pay one annual "sum of 400*l.*" That seems to me to be an active trust for the payment of an annual sum. I have paid careful attention to the argument of Mr. Lloyd Williams that under the Statute of Uses a legal estate is vested in the persons to whom this sum of 400*l.* a year is payable, but I am unable to accede to this argument. It seems to me that this deed creates only an equitable interest in respect of the sum of 400*l.* a year. I may say that at the present time the Royal Exchange Assurance, one of the defendants to the summons, is entitled to receive this sum of 400*l.* a year.

On February 11, 1861, the owner made his will. He died on April 28, 1863. Under his will the Hoxton Estate, subject to the annuities of 1000*l.* a year and 400*l.* a year which I have mentioned, passed in fee to William Henry Sharpe Sharpe, the son of James Birch Sharpe and the grandfather of the plaintiff William Henry Sharpe Sharpe. William Henry Sharpe Sharpe (the son) made his will on January 13, 1864, and died on February 15, 1867. His will was proved on April 2, 1868. By his will, after appointing David Lynch and his brother Alexander John Ellis executors and trustees, he continued as follows: " I devise and bequeath to the said David Lynch "and Alexander John Ellis their heirs executors administrators "and assigns respectively according to the nature and quality "thereof all my real estate and all my personal estate whatso- "ever and wheresoever upon trust (subject to the payment of "my debts and funeral and testamentary expenses) to pay the "annual income thereof to my wife Hannah Ida Sharpe "during her life if she shall so long continue my widow"— the son's widow is dead. Then the will continues: "And "upon further trust after the death or marriage of my said "wife out of the said annual income to pay or apply to or for "the benefit of each of my children by my said wife other than "and except my eldest and second son hereinafter named "the annual sum of one hundred pounds during his or her "life respectively and upon further trust after the death or "marriage of my said wife to raise out of my said real and "personal estate or some part thereof the principal sum of "four thousand pounds for my second son Henry Birch "Sharpe the same to be vested in him in point of interest at "my death." Nothing turns upon this sum of 4000*l.*; I understand that it was raised some time ago. Then there are certain provisions I need not read and the will continues: "And subject and charged and without prejudice as aforesaid "I direct my trustees to stand possessed of my said real and "personal estate in trust for my eldest son James William "Sharpe absolutely."

The position is that one of the son's children to whom an annuity of 100*l.* a year was given by the will, is still living. She is the defendant Miss Edith Ella Sharpe. So that there is still a subsisting trust under the son's will and the trusts thereunder are to pay an annuity of 100*l.* to Miss Edith Ella Sharpe and subject thereto in trust for James William Sharpe absolutely. The plaintiffs are the present trustees of the son's will, and the devolution of the trusteeship is set out in the affidavit of the plaintiff, who is the great-grandson, filed on March 18, 1929, in certain other proceedings, the last link in the chain of trusteeship being a deed of appointment dated December 14, 1917, under which the plaintiff Arthur Wingrove Fox is appointed to be a trustee jointly of that will with the plaintiff, who is the great-grandson. The Hoxton Estate was duly assured and transferred so as to vest in the plaintiffs jointly upon the trusts of the son's will.

As regards the grandson, to whom the property was given absolutely under the son's will, subject to the annuity thereby given to his sister, the position is as follows: The grandson made his will on March 11, 1917, and died on August 10, 1917. His will was proved on February 14, 1918. By his will, after appointing his wife Catherine Sharpe and his son—that is, the plaintiff who is the great-grandson—and the Public Trustee executors and trustees of his will, he devised and bequeathed "all my real estate of every tenure and all my personal estate "and effects whatsoever and wheresoever not hereby otherwise "disposed of (including as well real as personal estate over "which I may have any general power of appointment or "disposition by will) unto and to the use of the said Catherine "Edith Sharpe William Henry Sharpe and the Public Trustee "their heirs executors and administrators respectively according to the nature thereof" upon trust for sale. By clause 10 the trustees are directed to invest the proceeds of sale; they are to pay to the testator's daughter Ellin Mary Caryll the wife of Commander Cecil Vivian Usborne—she is the last defendant to the summons—" during her life for her sole and "separate use without power of anticipation by equal "quarterly instalments commencing with an apportioned "payment on the quarter day immediately following my "death such sum as will provide her with a fixed income of "400*l.* per annum and the income tax she is liable to pay "thereon." Then followed in clauses 13 and 14 the following provisions: " And subject to such annual charge in favour "of my said daughter shall stand possessed of the said trust "premises in trust to raise and pay thereout to my said "daughter the sum of three thousand pounds at such time or "times within the ten years immediately following my death "as they in their absolute discretion shall think fit." Then there is a direction as to the sum bearing interest, but nothing turns upon this as the sum in question has been raised some time ago. Then clause 14 is in the following terms: " And subject "to such annual charge and legacy in favour of my daughter "shall stand possessed of the residue of the said trust premises "in trust for my said son William Henry Sharpe Sharpe if he "shall be living at my death absolutely."

The position as I see it is this, that the legal estate in the Hoxton Estate passed from the son to the trustees of his will. The trustees of his will had their duties to perform, they had to pay the annuity of 100*l.* a year to the defendant Edith Ella Sharpe. Subject to the payment of that annuity and of the two annual sums payable under the earlier deeds, they held the estate upon trust for the grandson. It so happens that at the present time the plaintiffs are not only trustees of the son's will, but also trustees of the grandson's will. The devolution of the trusteeship of the latter will is set out in the affidavit to which I have referred. The last stage was that on June 23, 1928, by a deed of appointment of that date made between the plaintiff who is the great-grandson of the first part, the Public Trustee (who was then a trustee of the grandson's will) of the second part, Mrs. Usborne of the third part, and the plaintiff Arthur Wingrove Fox of the fourth part, Arthur Wingrove Fox was appointed to be a trustee of the will in the place of the Public Trustee and jointly with the plaintiff who is the great-grandson.

Now the question which I have to determine is one which has been brought before the Court for the purpose of clearing the title to the Hoxton Estate. The propositions which were put before me by Mr. Slade on behalf of the plaintiffs are briefly these. He says that the Hoxton Estate is settled land under the Settled Land Act, 1925, and that the plaintiffs are trustees of the settlement for the purposes of that Act. He relies on s. 1, sub-s. 1 (v.), of the Settled Land Act, 1925, which is in the following terms, reading from the beginning of the section : " Any deed, will, agreement for a settlement "or other agreement, Act of Parliament, or other instrument, "or any number of instruments, whether made or passed "before or after, or partly before and partly after, the commencement of this Act, under or by virtue of which instrument "or instruments any land, after the commencement of this "Act, stands for the time being— . . . . (v.) charged, whether

MORTON J.
1938
SHARPE'S DEED OF RELEASE, *In re.*
SHARPE AND FOX *v.* GULLICK.

"voluntarily or in consideration of marriage or by way of family "arrangement, and whether immediately or after an interval, "with the payment of any rentcharge for the life of any person, "or any less period, or of any capital, annual, or periodical sums "for the portions, advancement, maintenance, or otherwise "for the benefit of any persons, with or without any term of "years for securing or raising the same; creates or is for the "purposes of this Act a settlement and is in this Act referred "to as a settlement, or as the settlement, as the case "requires: . . . ." Mr. Slade submits that, under the documents to which I have referred, the Hoxton Estate stands for the time being charged with the payment of certain annual sums for the benefit of certain persons and is therefore the subject of a settlement, and unless sub-s. 7 (to which I shall now refer) applies, that argument would appear to be well founded. Sub-s. 7, which was introduced by the Law of Property (Amendment) Act, 1926, provides as follows: "This section does not apply to land held upon trust for sale," and I must therefore consider whether the Hoxton Estate was held upon trust for sale within the meaning of sub-s. 7. The meaning of the words "upon trust for sale" in this section was considered by Lord Romer, then Romer J., in the case of *In re Parker's Settled Estates.* (1) Before referring to that case I ought to refer to s. 117, sub-s. 1 (xxx.), of the Settled Land Act, 1925, which provides (inter alia): "In this "Act, unless the context otherwise requires, the following "expressions have the meanings hereby assigned to them "respectively, that is to say— . . . . 'trust for sale' 'trustees "'for sale' and 'power to postpone a sale' have the same "meanings as in the Law of Property Act, 1925." Turning to the Law of Property Act, 1925, I find it is provided by s. 205, sub-s. 1 (xxix.), as follows: "In this Act unless the "context otherwise requires, the following expressions have "the meanings hereby assigned to them respectively, that is "to say— . . . . 'Trust for sale,' in relation to land, means an "immediate binding trust for sale, whether or not exercisable "at the request or with the consent of any person, and with

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(1) [1928] Ch. 247.

MORTON J.

1938

SHARPE'S DEED OF RELEASE, *In re.* SHARPE AND FOX *v.* GULLICK.

"or without a power at discretion to postpone the sale; "'trustees for sale' mean the persons (including a personal "representative) holding land on trust for sale; and 'power "'to postpone a sale' means power to postpone in the exercise "of a discretion." Romer J. in the case to which I have referred said this (1): "Now 'trust for sale' is defined as "meaning, in relation to land, an immediate binding trust "for sale whether or not exercisable at the request or with the "consent of any person, and it was contended before me that "the land is not held upon an immediate binding trust for sale "within the meaning which it was said had been given to those "words by Tomlin J. in *In re Leigh's Settled Estates.* (2) In "that case the learned judge came to the conclusion that "where the subject-matter of a settlement is the whole "unincumbered fee simple, 'the land' is not 'subject to an "'immediate binding trust for sale,' so long as there is not a "trust for sale which is capable of overriding all charges "having, under the settlement, priority to the trust for sale. "At the time that this decision was given the Law of Property "(Amendment) Act, 1926, had not been passed, so that the "learned judge was not dealing with sub-s. 7 of s. 1 of the "Settled Land Act. He was merely dealing with s. 20, sub-s. 1 "(viii.), of the Act. But I feel some little doubt as to whether "the learned judge held that 'the land' in the case before "him was not subject to any trust for sale, inasmuch as the "subject-matter of the trust was merely the fee simple subject "to the incumbrance, or whether he held that no land can "ever be subject to a binding trust for sale, unless the trustees "have power to overreach prior equitable interests. If the "latter be the real reason of his decision, I find myself, with "the greatest respect, unable to follow it. For it means that "there cannot be, within the meaning of the Settled Land Act, "any trust for sale of land that is subject to equitable "interests, unless the trustees have a legal estate and are "either two or more individuals approved or appointed by "the Court, or the successors in office of such individuals or a "trust corporation." Romer J. then went on to give his

(1) [1928] Ch. 247, 257.

(2) [1926] Ch. 852.

MORTON J.

1938

SHARPE'S DEED OF RELEASE, *In re.*

SHARPE AND FOX *v.* GULLICK.

reasons for the view he expresses, and he says this (1): "There "is therefore, in my opinion, a trust for sale in the present "case affecting the legal estate in fee simple vested in the "trustees of the 1924 deed. But is there a trust for sale that "brings the present case within the exception to s. 1 of the "Settled Land Act introduced by the new sub-s. 7? In my "opinion there is not. It is, I think, reasonably clear that "that sub-section only applies where 'the land' that would "otherwise be the subject of a settlement under sub-s. 1 is "held upon trust for sale." Then he refers again to the decision of Tomlin J. in *In re Leigh's Settled Estates* (2) and continues as follows: ". . . . it would, I think, be proper "and in accordance with the general spirit of the Acts to regard "all cases in which the whole legal estate, that would otherwise "be comprised in a settlement, is vested in trustees for sale, "as coming within sub-s. 7 of s. 1. But in the present case "there is a legal estate in the term of 1000 years which cannot "be disposed of under the trust for sale, and which, upon "the coming into force of the Law of Property Act, 1925, "would seem to have vested in the trustees of the portions term "by virtue of para. 3 of Part II. of Schedule 1 of that Act. "The whole legal estate which is the subject-matter of the "settlement is not therefore subjected to a trust for sale, and "in my opinion sub-s. 7 has no application to the case." Now the decision in *In re Parker's Settled Estates* (3) is not directly in point, because in that case there was a legal estate in a term of 1000 years which could not be disposed of under the trust for sale. But agreeing as I do with both the conclusions and the reasoning in that case, I derive assistance from certain observations of the learned judge, and in particular the words: "The whole legal estate which is the subject-matter of the "settlement is not therefore subjected to a trust for sale." He seems to have regarded that as being the test whether s. 1, sub-s. 7, of the Settled Land Act, 1925, applies. In the case of *In re Norton* (4) Romer J. again had to consider the meaning of s. 1, sub-s. 7, of the Settled Land Act, 1925, and I find that case also assists me in coming to the conclusion at which I have arrived.

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(1) [1928] Ch. 247, 261, 262.

(2) [1926] Ch. 852.

(3) [1928] Ch. 247.

(4) [1929] 1 Ch. 84, 88.

The position in that case was that upon the death of the second Lord Norton, who had been a life tenant of the land, a question arose as to the meaning of the words "trust for sale" in s. 3 of the Settled Land Act, 1925. Romer J. said this: ". . . . what I have to consider here is whether, on the "death of Lord Norton, the legal estate in the whole subject-"matter of the settlement, which undoubtedly had existed "up to that date, was thereafter held upon trust for sale. "Up to his death he had had the legal estate in fee simple, "and that was the legal estate which was the subject of the "settlement. On his death it vested in his personal representa-"tives, his special representatives to whom probate had been "granted, and was not vested in the trustees for sale"—that is, the trustees for sale under certain trusts which arose on Lord Norton's death. Then the learned judge turns to s. 7, sub-s. 5, of the Act and proceeds: "But the trustees for "sale in this case have not become absolutely entitled to the "settled land free from all charges taking effect under the "settlement. There are certain equitable rent-charges which "take effect in priority to the trust for sale. That being so, "it appears to me that not only was the whole legal estate the "subject-matter of the settlement not held upon trust for "sale upon the death of the second Lord Norton, but that the "trustees for sale as such had not, and have not now, a right "to call for the legal estate. So far, I must, as it seems to me, "come to the conclusion that on the death of the second Lord "Norton the land did not cease to be settled land, but continued "to be settled land and is still settled land." Again the learned judge applies the test "Is the whole legal estate the "subject-matter of the settlement held upon trust for sale?" Now in the present case it seems to me that the trustees of the son's will hold the Hoxton Estate upon trust, first, to pay the two annual sums payable under the deed of release and the marriage settlement; secondly, to pay Miss Sharpe's annuity under the will and subject thereto on trust for the grandson's estate. It is true that the trustees of the son's will happen also to be the trustees of the grandson's will. I do not think that by reason of that fact they hold the Hoxton Estate on trust for sale within the meaning of s. 1, sub-s. 7, of the Settled Land Act, 1925. If the trustees of the grandson's will had to-day been persons who were not also trustees of the son's will it would, I think, have been clear that the whole legal estate in the land was held by the latter trustees upon trusts which did not include a trust for sale, and that the former trustees held upon trust for sale only the beneficial interest in the land which was given to the grandson by the son's will. If this is so, the fact that the same persons are to-day trustees of both wills cannot, in my view, have the result that the whole legal estate in the land is held, at the present time, on trust for sale within s. 1, sub-s. 7, of the Settled Land Act, 1925.

G. P. Slade. On the question which of the instruments create the settlement :—Had the grandson's will here directed division of the property into shares, it would have been difficult to call it a settlement ; but it directed an equitable charge and created an annuity, and that brings it within s. 1, sub-s. 5, of the Settled Land Act, 1925. In considering what instruments constitute the settlement, the Court must look at each instrument separately. There is no difficulty about the first three, and the grandson's will creates an annuity which is charged on the land in equity. Having reached that stage, it is prima facie within the definition in s. 1, sub-s. 5, of the Settled Land Act, 1925, and it cannot be taken out of that sub-section unless the Court finds that the whole of the land is held under a trust for sale under sub-s. 7. The plaintiffs are statutory owners under the compound settlement.

J. M. Lightwood. The compound settlement includes the deed of March 11, 1818, declaring the trusts of the 1000 years' term created by the deed of release.

MORTON J. In my view the settlement under which the Hoxton Estate is now settled land is a compound settlement and the documents constituting the compound settlement are, first, the deed of release, secondly, the marriage settlement, thirdly, the son's will, and fourthly, the grandson's will. Mr. Lightwood has invited me to add to these documents constituting the compound settlement the deed of March 11, 1818, by which trusts are declared of the annuity of 1000*l.* a year created by the deed of release. I cannot appreciate why a document which merely declares the trusts upon which an annuity is to be held can be said to be one of the instruments under which the Hoxton Estate, "the land," "stands for "the time being charged with the payment of certain annual "sums." In my view it is not included in the documents constituting the compound settlement.

G. P. Slade. As to question 2. In order to establish that the plaintiffs are trustees of the compound settlement, they must be brought within s. 31, sub-s. 1, of the Settled Land Act, 1925. The first half of that sub-section does not apply to the present case, because there are no Settled Land Act trustees under any of the first three instruments: but the second half which is added by the Schedule to the Law of Property (Amendment) Act, 1926, does apply if the Court there reads "tenant for life or statutory owner" not as meaning tenant for life or statutory owner under a compound settlement, but as meaning tenant for life or statutory owner under a particular instrument which forms part of a compound settlement.

If it is argued that the grandson's will creates a settlement in itself, it must also be argued that it comes within s. 1, sub-s. 5, of the Settled Land Act, 1925. If one of the ways of making land settled land is by creating annuities, the fact that the annuities take effect behind a trust for sale does not prevent the document from being a settlement, and, if it is found that the trust for sale is not an immediate binding trust for sale, the land is settled land. If the Court can be satisfied that the will is a settlement in itself, the rest follows. On any view, if the plaintiffs are not statutory owners and trustees of the settlement there is no one else who can claim to be so, and the position is that at the present moment there are no trustees at all of the compound settlement. The Court therefore has jurisdiction to appoint trustees and is asked to appoint the plaintiffs.

J. M. Lightwood. The question depends on s. 31, sub-s. 1, of the Settled Land Act, 1925. The trustees of the deed of March 11, 1818, are not absolutely Settled Land Act trustees. The owner of the land, however, had power to redeem the annuity by paying a capital sum. If he had done so and had handed over stocks, they were to be held by the trustees, who were to have a power to realize them and invest the money in land and to hold the land on trust for sale. Therefore the trustees are trustees for sale but not so as to come within the provisions of the earlier part of s. 31. That is some qualification for them to be appointed trustees of the compound settlement. If the Court so appoints them, they become statutory owners, vest the property in themselves, and have the management of the Hoxton Estate. That would not be reasonable. It is submitted that one trustee should be appointed from the trustees of the deed of March 11, 1818, to represent the rent-charges, and the other might be the plaintiff who is the beneficiary.

H. Lloyd Williams. If the question of trusteeship is open to the Court, the Royal Exchange Assurance also should be appointed a trustee of the compound settlement.

Hon. B. L. Bathurst. There are really two questions, first, whether the plaintiffs are trustees, secondly, if they are not, who ought to be appointed. The plaintiff who is the great-grandson is " a person entitled to the income of land "under a trust or direction for payment thereof to him . . . . "until sale of the land, ..." within s. 20, sub-s. 1 (viii.), of the Settled Land Act, 1925, and therefore has the powers of a tenant for life under that Act.

MORTON J. I now have to deal with question 2 of the summons which, as amended pursuant to the leave I have already given to add Mr. Arthur Wingrove Fox, the first defendant, as a plaintiff, will read as follows: " If the answer "to question 1 be in the affirmative whether the plaintiffs are "trustees for the purposes of the Settled Land Act, 1925, and "statutory owners under the compound settlement." During the discussion of this question Mr. Bathurst has submitted that the plaintiff who is the great-grandson is a person having the powers of a tenant for life under the Settled Land Act, 1925, by reason of s. 20, sub-s. 1 (viii.).

The position is, as appears in my judgment on the first question, that the plaintiff who is the great-grandson subject to the various annuities created by the various documents to which I have already referred, is under the grandson's will absolutely entitled to the proceeds of sale of the Hoxton Estate. Mr. Bathurst has submitted that he comes within this clause of the sub-section to which I have referred: "a "person entitled to the income of land under a trust or direction "for payment thereof to him . . . . until sale of the land." My own view is that a person in the position of the plaintiff who is the great-grandson does not come within that definition; but even if I had inclined to the contrary view I should have hesitated to accede to Mr. Bathurst's argument in view of the judgment of the Court of Appeal in *In re Astor* (1) and in particular the judgment of Warrington L.J.

Mr. Slade has submitted that the plaintiffs are trustees of the compound settlement by virtue of s. 31 of the Settled Land Act, 1925. He suggests, as I understand his argument, that if one regards the grandson's will by itself, there is a tenant for life or statutory owner under that document and that the plaintiffs are trustees of that document for the purposes of the Act. He then goes on to argue that the concluding words of s. 31, sub-s. 1, apply to the present case. I think I need only say that I am unable to appreciate why that is so. It may be that I have not fully appreciated the force of Mr. Slade's argument, but I cannot find that s. 31 constitutes the plaintiffs trustees of the compound settlement. I answer question 2 in the negative.

Question 3 does not arise. The summons asks next: "If necessary that the plaintiffs may be appointed trustees of "the said compound settlement for the purposes of the

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(1) [1922] 1 Ch. 364.

"Settled Land Act, 1925." In view of my answers to questions 1 and 2 I think it right to make this appointment. It has been suggested that a representative of the present trustees of the deed of March 11, 1818, should also be appointed a trustee, and it has also been suggested that the Royal Exchange Assurance, the present trustee of the annuity of 400*l.* a year created by the marriage settlement, should also be appointed a trustee, although I do not gather that the latter party desires to act without remuneration. I see no reason for making either of these appointments. The present trustees are the trustees not only of the son's will but also of the grandson's will, and I see no reason why they are not the proper persons to discharge the duties of being trustees of the compound settlement. With regard to making the appointment of these persons as trustees, as a matter of practice there should be an affidavit of fitness.

[His Lordship then held, on question 5, that the legal estate in fee simple in the Hoxton Estate was vested in the events which had happened in the plaintiffs as trustees of the son's will, and that it ought forthwith to be vested by a proper vesting instrument in them as statutory owners under the compound settlement, when they were appointed trustees of that settlement. His Lordship directed that the order should not take effect until affidavits of fitness had been produced, whereupon the plaintiffs would become trustees of the compound settlement by virtue of the order.]

Solicitors: *Frere, Cholmeley & Co.; Jutsum, Jones, Arthur & Light; George Brown, Son & Vardy.*

K. R. A. H.

In re LEICESTER'S SETTLED ESTATES.

COKE AND OTHERS *v.* EARL OF LEICESTER AND OTHERS.

MORTON J.

1938

July 15, 20.

[1937. L. 3169.]

Tithe rentcharge—Redemption annuity—Settled estate—Agricultural land —Tenant for life and remainderman—Apportionment of annuity— Tithe Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 87), *s.* 1, *sub-s.* 1; *s.* 3, *sub-ss.* 1, 2; *s.* 4, *sub-ss.* 1, 2, 4; *s.* 5, *sub-s.* 1; *s.* 6, *sub-s.* 1; *Tithe Act,* 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 43), *s.* 1; *s.* 2, *sub-s.* 1; *s.* 3, *sub-ss.* 1, 2; *s.* 13, *sub-ss.* 1, 4, 5, 6.

By s. 1 of the Tithe Act, 1936: "Subject to the provisions "of this Act, all tithe rentcharge shall be extinguished on the "second day of October, nineteen hundred and thirty-six (in this "Act referred to as 'the appointed day'), and accordingly as "from that day the land out of which any tithe rentcharge issued "immediately before that day shall be absolutely discharged "and freed therefrom."

By s. 3, sub-s. 1: "Subject to the provisions of this Act, an "annuity (to be called a 'redemption annuity') shall be charged "in respect of the land out of which a tithe rentcharge extin"guished by this Act issued immediately before the appointed "day, for the use of His Majesty, for the period commencing "on the appointed day and ending on the day preceding the "sixtieth anniversary thereof."

By sub-s. 2: "The amount of an annuity charged by this "section in respect of the land out of which a rentcharge issued "shall be the amount which bears to the amount of the rentcharge "the same proportion as the following sum bears to the sum of "one hundred pounds, that is to say—

"(*a*) if any of the said land was on the first day of April, "nineteen hundred and thirty-six, agricultural land, ninety-one "pounds eleven shillings and twopence; . . . ."

By s. 13, sub-s. 1: "An annuity shall be payable half-yearly "on each payment date."

By sub-s. 4: "An annuity shall be deemed to be a periodical "payment in the nature of income within the meaning of the "Apportionment Act, 1870."

By sub-s. 5: "No deduction in respect of income tax shall "be made from any instalment of an annuity."

By sub-s. 6: "For all the purposes of the Income Tax Acts, "five-sixths and no more of each instalment of an annuity shall "be deemed to be a payment by way of interest, and the amount "deemed to be so payable in any year of assessment shall be "allowed as a deduction in respect of that year from the annual "value, as assessed under Schedule A, of the lands in respect of "which the annuity is charged: . . . ."

MORTON J.

1938

LEICESTER'S SETTLED ESTATES, *In re.*

COKE *v.* EARL OF LEICESTER.

The Holkham settled estates, or parts of them, were subject, until the coming into force of the Tithe Act, 1936, to tithe rentcharges exceeding 7000*l.* a year. The whole of the settled land, with a small exception, was agricultural land. The Act did not provide how the redemption annuity was to be borne as between capital and income, and this summons was taken out by the trustees for the purposes of the Settled Land Act, 1925, of the settled estates, for the decision of that question. The summons asked (inter alia) whether, on the true construction of s. 13 of the Tithe Act, 1936, or otherwise, the tenant for life for the time being of the settled estates or his assignees, if any, was or were and would be entitled to be recouped out of capital moneys any and if so what part of all payments made by him or them on account of the redemption annuity. At the date of the summons, both the tenant for life in possession and the tenant for life in remainder had assigned their life interests :—

Held, (1.) that s. 13, sub-s. 4, of the Tithe Act, 1936, refers only to apportionment as to time, and does not elucidate the question whether there is to be apportionment as between tenant for life and remainderman.

(2.) that, even if there should be apportionment as between them, s. 13, sub-s. 6, did not justify throwing a sixth of the annuity on capital.

(3.) that there ought not to be any apportionment as between tenant for life and remainderman, and that the tenant for life should bear the annual payments.

In re Poyser [1910] 2 Ch. 444, considered and distinguished.

ADJOURNED SUMMONS.

Before the coming into force of the Tithe Act, 1936, the Holkham settled estates (hereinafter called "the settled estates"), or parts of them, were subject to rentcharges which aggregated approximately 6902*l.* a year. Further rentcharges, which were part of the settled estates, were charged, as to 1717*l.* 10*s.* 2*d.* of them, exclusively on the settled estates: and therefore, by s. 21 of the Tithe Act, 1936, that amount of them did not come within the Act's provisions relating (inter alia) to redemption annuities and redemption stock. Sect. 21 contains provisions as to tithe rentcharge vested immediately before October 2, 1936, in the owner of the land out of which it issues, and exempts it from all the Act's provisions except ss. 1 and 31. Of the balance of the further rentcharges, charged partly on the settled estates and partly on other lands, 871*l.* 11*s.* 2*d.* was attributable to the settled estates. The Act, subject to its provisions, extinguished all

MORTON J.

1938

LEICESTER'S SETTLED ESTATES, *In re.* COKE *v.* EARL OF LEICESTER.

tithe rentcharge on October 2, 1936; by s. 3, sub-s. 1, it created a redemption annuity charged in respect of land out of which tithe rentcharge issued immediately before that day, for the period commencing on that day and ending on the day preceding its sixtieth anniversary; and, by sub-s. 2 (*a*), it fixed the amount of the annuity, in the case of agricultural land, at an amount bearing to the amount of the rentcharge the same proportion as 91*l.* 11*s.* 2*d.* bears to 100*l.* All parts of the settled estates, with a small exception, were agricultural land. The Act did not provide how redemption annuities were to be borne as between capital and income, and it was for the decision of that question that this summons was issued.

Before the Tithe Act, 1925, came into force, tithe had to be borne, as between tenant for life and remainderman, by the tenant for life. (1)

Sect. 2 of the Tithe Act, 1936, provided for the compensation of the persons interested in the tithe rentcharge in respect of its extinguishment by the issue of redemption stock charged by way of guarantee on the Consolidated Fund and the growing produce thereof.

The summons was issued on December 24, 1937, by the trustees for the time being for the purposes of the Settled Land Act, 1925, of the several settlements affecting the settled estates, who were: Commander the Honourable Roger Coke, Major-General Sir Richard Granville Hylton Howard-Vyse, and the Honourable Richard Coke.

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(1) By s. 1, sub-s. 1, of the Tithe Act, 1925: "The sums becoming "payable on or after the appointed "day" (i.e., by s. 26, sub-s. 3, of the Act, ". . . . . such date or "dates not earlier than the sixth "day of April, nineteen hundred "and twenty-six, and not later "than the first day of April, "nineteen hundred and twenty-"seven, as His Majesty may fix "by Order in Council, ...") "in "respect of a tithe rentcharge in "lieu of being computed in manner "prescribed by the Tithe Acts "shall be computed on the basis "of one hundred and five pounds "for every one hundred pounds of "tithe rentcharge."

By s. 3, sub-s. 1: "Any tithe "rentcharge which immediately "before the appointed day is "attached to a benefice shall on "that day be transferred to, and "by virtue of this Act become "vested in, Queen Anne's Bounty "for all the interest therein so "attached, subject to any charge "or liability affecting that interest, "but without prejudice to the "powers of the person in whom "the tithe rentcharge was vested "to recover and enforce the "recovery of any arrears payable "before the appointed day."

By sub-s. 2: "Any tithe rent-"charge so vested in Queen Anne's "Bounty shall while so vested be "held in trust for the incumbent "of the benefice to which it was "previously attached, or other the "person for the time being entitled "to receive the emoluments of the "benefice."

By s. 4, sub-s. 1: "For the purpose of the redemption before "the expiration of a period of "eighty-five years from the "appointed day of the tithe rentcharge so vested in Queen Anne's "Bounty there shall be payable "to Queen Anne's Bounty by way "of sinking fund payment in "respect of every one hundred "pounds of tithe rentcharge so "vested the annual sum of four "pounds and ten shillings, and "such annual sum as aforesaid "shall continue payable until the "half-yearly date of payment "which precedes the expiration of "the said period of eighty-five "years."

By sub-s. 2: "The annual sum "so payable shall for all purposes "(including those of section eight "of the Tithe Act, 1891) be "treated as an addition to and as "part of the sums payable in "respect of the tithe rentcharge "in respect of which it is payable, "and all the enactments relating "to tithe rentcharge shall apply "thereto accordingly: Provided "that such additional sum as "aforesaid shall not, for the purposes of the enactments relating "to income tax, land tax, or "rating, be treated as part of the "sums payable in respect of the "tithe rentcharge, but shall for "those purposes be treated as an "instalment of a capital payment."

By sub-s. 4: "As from the day "following the half-yearly date "for payment of tithe rentcharge "which precedes the expiration of "the said period of eighty-five "years the land out of which any "tithe rentcharge so vested in "Queen Anne's Bounty issues "shall be absolutely discharged "and freed therefrom except so "far as there may be then due "any arrears in respect thereof."

By s. 5, sub-s. 1: "Out of the "annual sums received in respect "of every one hundred pounds of "tithe rentcharge so vested in "them, Queen Anne's Bounty "shall in each year, subject to the "provisions hereinafter contained, "—(*a*) carry four pounds and ten "shillings subject to any deduction on account of remission of tithe rentcharge to the "sinking fund; and (*b*) pay the "sum of five pounds to the Commissioners of Inland Revenue to "be applied by them towards the "payment of the sums hereinafter "directed to be paid by them on "account of rates; . . . ."

By s. 6, sub-s. 1: "The sums "carried to the sinking fund under "this Part of this Act in respect "of any tithe rentcharge shall be "accumulated by Queen Anne's "Bounty during the accumulation "period, or until the redemption "or merger of the tithe rentcharge "if it is redeemed or merged "before the expiration of that "period, by the investment in "authorised securities of such "sums and of the income received "or accruing during the accumulation period in respect of such "investments."

The defendants to the summons were: the Right Honourable Thomas William, third Earl of Leicester, the tenant for life; the Honourable Thomas William Coke, commonly called Viscount Coke, tenant for life in remainder expectant on the Earl of Leicester's death; the Holkham Estates Company, the assignee of the life interests of the Earl of Leicester and Viscount Coke; the Honourable Thomas William Edward Coke, tenant for life in remainder expectant on the deaths of the Earl of Leicester and Viscount Coke; and his wife, Lady Elizabeth Mary Coke, contingently entitled to a jointure rentcharge.

The summons asked (inter alia): (1.) whether, on the true construction of s. 13 of the Tithe Act, 1936, or otherwise, the tenant for life for the time being of the settled estates or his assignees (if any) was or were and would be entitled to be recouped out of capital moneys any and if so what part of all payments made by him or them respectively on account of the redemption annuity created and charged upon the settled estates by s. 3 of the Act:

(2.) If the answer to question (1.) was in the affirmative, whether any sums which ought to be so recouped would, until raised and paid to the tenant for life or his assignees, be charged on the capital of the settled estates:

(3.) If the answer to question (2.) was in the affirmative (*a*) whether the charge would carry interest at any and what rate, and (*b*) whether the charge would have priority over or be subject to (i.) all annual or periodic sums and (ii.) all capital sums charged (by the settlement or settlements for the time being affecting the settled estates) on the settled estates in priority to the estate of the tenant for life by whom or in whose right the recoupment was claimed:

(4.) That the defendant Lady Elizabeth Mary Coke might be appointed to represent all persons who at the date of the summons were, or on coming into existence would be, entitled in possession, reversion, or remainder, and whether for a vested interest or contingently to any charge on, or any estate or interest, other than a life or lesser interest, in the settled estates.

G. M. Parbury for the trustees. The question is whether any part of the redemption annuity can be apportioned between capital and income and, if so, what part of it can be so apportioned.

R. W. Goff for the tenant for life and assignees. Sect. 13, sub-s. 6, of the Tithe Act, 1936, shows that, on principle, this tithe redemption annuity ought to be apportioned between capital and income. Exactly how that apportionment should be effected is a matter for the Court's discretion. The tenant for life's claim to apportionment can be based either on the general principle of law that corpus must bear capital charges and income the interest on them (for which purpose the Court must be satisfied that the redemption annuity is a capital charge), or, alternatively, on the Court's inherent jurisdiction to apportion liability between income and corpus: see Underhill on Trusts and Trustees, 8th ed., p. 258, sub-para. (*a*), where it is stated that "Where a capital sum is secured on "property, it is payable out of corpus; but the interest on "it is payable out of income. . . ." If the Court can be satisfied that the redemption annuity is a charge of a capital nature, the next point to observe is that the Act, in charging the annuity, draws no distinction between capital and income. It follows that the parties' rights can be determined only by the Court's drawing a distinction by some form of apportionment. In s. 3 of the Act, the annuity is described as a redemption annuity, which it plainly is. It is simply a contribution to redemption moneys and the sum is plainly a capital charge. It does not matter whether it is charged as a lump sum or as a capital sum. It is in fact a charge to raise moneys for the purpose of compensation. The charge is in the nature of a capital charge, though not an immediate payment. As to the method of apportionment, *In re Poyser* (1), is applicable. It would be entirely inequitable, the Act having abolished tithe and substituted a temporary charge, that the person who happens to be tenant for life at the time should be just unlucky. The Court should make some apportionment so that the tenant for life gets some benefit out of the Act.

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(1) [1910] 2 Ch. 444.

The Court's jurisdiction to do so is inherent: *In re Hotchkys* (1); *In re Shee.* (2) Sect. 13, sub-s. 4, of the Tithe Act, 1936, is referring only to apportionment as to time. It gives no help on the question now before the Court. Sub-s. 6 provides that for purposes of the Income Tax Acts, five-sixths of each instalment of an annuity shall be deemed to be a payment by way of interest, and that the amount deemed to be so payable in any year of assessment shall be allowed as a deduction in respect of that year from the annual value, as assessed under Schedule A, of the lands in respect of which the annuity is charged. In the present case, the Court might apportion one sixth of the redemption annuity to capital and five-sixths of it to income.

Roger Turnbull for the remaindermen. The burden imposed by the Tithe Act, 1936, should be borne entirely by income. The Court should consider the Tithe Act, 1925. Before that Act came into force, the amount payable in respect of tithe rentcharge fluctuated with the price of corn, and one of the purposes of that Act was to stabilize the amount of tithe rentcharge. The Act also provided for the redemption, after a period of years, of tithe rentcharge, and for that purpose there was a sinking fund, so that, at the end of the eighty-five years laid down by the Act, the tithe rentcharge came to an end, the sinking fund being designed then to redeem it. The Legislature evidently took the view that it must be a capital charge, because there would be no question under that Act as between tenant for life and remainderman: but the Tithe Act, 1936, contemplates the amount being discharged by the owner of the land. It is probably accepted that the sinking fund is a capital charge. There is no reported decision on that point under either Act.

The remaindermen rely on sub-ss. 4 and 6 of s. 13 of the Tithe Act, 1936. Sub-s. 6 begins with the words "for all "the purposes of the Income Tax Acts." Had the Act intended that for any other purpose there was to be the limitation of the annuity laid down in the sub-section, it would have said so. Thus, it must have occurred to the Legislature, when it passed the Act, that a question would arise between tenant for life and remainderman, and if it had intended to give some benefit to the tenant for life at the expense of the remainderman it would have so provided. If one-sixth were the true limitation, it would throw a tremendous burden on capital, because, under the Act of 1925, the sinking fund, which was calculated on the footing that at the end of the eighty-five years there would be enough money accumulated to have the 105*l.*, involved a payment of 4*l.* 10*s.* If it was contemplated under the Act of 1936 that some portion of the annuity was a capital charge, one would have expected to find some kind of machinery by which the capital charge could be enforced. Before the Act of 1925, there could be no question of any apportionment between capital and income of a tithe rentcharge, because it was payable for ever, and a burden imposed on the whole of the lands. The Act of 1925 gives no benefit to anybody except, possibly, the tenant for life in the case of a settlement, because it certainly stabilizes the amount to be charged: that, however, is not necessarily a benefit, because it might be higher than the amounts otherwise payable; but the Act did provide that the tithe rentcharge should come to an end after eighty-five years by means of a sinking fund, and the 4*l.* 10*s.* would clearly be a capital charge. There are much stronger reasons for throwing the 4*l.* 10*s.* on to capital under the Act of 1925, than there are for throwing one-sixth of the redemption annuity on to capital under the Act of 1936. There is no justification for throwing any part of the burden which, by the Act itself, is rendered payable by the tenant for life, on capital. If, however, the Court holds that there should be an apportionment, the question will arise, on what basis should it be made. There are three choices: first, the basis of *In re Poyser* (1) and *In re Perkins* (2); second, the basis of five-sixths and one-sixth, and third, such equitable basis as to the Court seems right. The first cannot apply, because the present case is a case of an interim charge, some portion of which capital ought properly to bear. If the second be

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(1) (1886) 32 Ch. D. 408.

(2) [1934] 1 Ch. 345.

(1) [1910] 2 Ch. 444.

(2) [1907] 2 Ch. 596.

adopted, it is going to operate very harshly on corpus, because it is going to produce, at the end of the sixty years which, under the Act of 1936, replace the eighty-five years laid down by the Act of 1925, a much larger sum than is required. The only fair basis will be on the footing of a sinking fund which, at the end of the sixty years, will provide the necessary adequate payment.

R. W. Goff in reply. A large part of the argument for the remaindermen was addressed to showing the Court that, by the provisions of the Tithe Act, 1936, the liability for tithe rentcharge is thrown on the owner of the estate. The tenant for life and assignees accept that argument : but the question then arises whether the owner is entitled to any kind of indemnity. The owner may be a bare trustee with no beneficial interest, a trustee with duties to perform and with no beneficial interest, or, as in the present case, a tenant for life who has assigned his interest. Therefore he must have some right of indemnity against his beneficiaries. Sect. 33 of the Tithe Act, 1936, which provides for the limitation of the liability of trustees and personal representatives as owners of land, shows plainly that he may have such a right. The Act is dealing as between the Crown on the one hand and the owner on the other. It is not suggested that a bare trustee, if he has to pay the liability of the person entitled, is not entitled to indemnify himself out of capital. It is quite plain that, in form, the Legislature abolished tithe rentcharge and, having done that, imposed a new liability of an entirely new type : but, apart from the form of the transaction and looking simply to the merits, some part of the liability ought to be thrown on capital. If there is no apportionment, almost the whole advantage will accrue to capital, in that the sinking fund will be abolished.

MORTON J. [after stating the facts :] Counsel have informed me that they are not aware of any authority deciding whether the 4*l.* 10*s.* per annum payable by way of sinking fund payment under the Tithe Act, 1925, ought to be treated as being payable by the tenant for life of settled land or by the remaindermen, and I do not propose to express any opinion on the point, which has ceased to be of any materiality. But it is, I think, helpful, when one comes to consider the provisions of the 1936 Act, to observe that the 1925 Act expressly provided for a sinking fund payment in contemplation of ecclesiastical tithe rentcharge coming to an end at the expiration of a period of eighty-five years.

[His Lordship then read the preamble to, and ss. 1 to 3 of, the Tithe Act, 1936, and continued :] It is to be observed that the effect of the 1936 Act was to benefit the payer of tithe in three respects. In the first place, the annual payment was to be 91*l.* 11*s.* 2*d.* for every 100*l.* of tithe rentcharge previously payable. In the second place, the Act abolishes the sinking fund payment, and in the third place, it shortens the period of eighty-five years to a period of sixty years. But the Act contains no statement in terms as to how the redemption annuity is to be borne as between capital and income. Certain provisions have, however, been referred to as bearing upon that matter and in particular the provisions of s. 13. Sect. 13, sub-s. 1, provides : " An annuity shall be payable half-yearly "on each payment date." I do not think sub-ss. 2 and 3 are material, but Mr. Turnbull (who appears for the persons interested in capital) has relied strongly upon sub-s. 4, which says : " An annuity shall be deemed to be a periodical "payment in the nature of income within the meaning of the "Apportionment Act, 1870." He relies upon that as an indication that the Legislature intended the redemption annuity to be borne by the tenant for life. I do not derive any real assistance from that provision, because I think that Mr. Goff's comment is well founded that this sub-section deals only with apportionment as to time and does not throw any light upon the question of apportionment as between tenant for life and remainderman. Sub-s. 5 provides : "No deduction in respect of income tax shall be made from "any instalment of an annuity," and sub-s. 6 provides : "For all the purposes of the Income Tax Acts, five-sixths "and no more of each instalment of an annuity shall be "deemed to be a payment by way of interest, and the amount "deemed to be so payable in any year of assessment shall be "allowed as a deduction in respect of that year from the annual "value, as assessed under Schedule A, of the lands in respect "of which the annuity is charged." Mr. Goff, for the tenant for life, says that this sub-section gives some indication that the Legislature contemplated a part of the redemption annuity being charged to capital, although he does not suggest that the Court is bound as to the proportions of five-sixths and one-sixth. Mr. Turnbull, on the other hand, points out that it begins with the words " For all the purposes of the Income "Tax Acts," and says that if the Legislature had intended that any part of the annuity was to be borne by the capital of a settled estate, the Act would have contained a provision in express terms to this effect.

There is this further comment which I desire to make upon that sub-section. I cannot see any logical basis whatever for throwing one-sixth of the annuity upon capital, assuming that there should be any apportionment at all. I think it is correct to say that in no other section of the Act can one find any indication that a portion of this annual sum, described as a redemption annuity, ought to be charged upon capital as between tenant for life and remaindermen, and whatever may be the reason for sub-s. 6 of s. 13—and counsel cannot suggest any satisfactory reason—I do not find that it leads me to the conclusion that there ought to be any such apportionment.

Three methods of apportionment have been suggested to me. The first is that I should apply the principle which was applied in *In re Poyser* (1), and that each instalment of the annual sum ought to be apportioned as between capital and income according to the method adopted in that case. I do not think that that form of apportionment would be appropriate. It would be appropriate only if each instalment of this annual payment is in the nature of a debt payable out of capital, the payment whereof is postponed. I do not think this is the true view. It is also suggested, as a second alternative,

(1) [1910] 2 Ch. 444.

that I should apportion each instalment by following the proportions adopted in s. 13, sub-s. 6, and apportioning five-sixths of each instalment to income and one-sixth to capital. For my part I can see no logical basis for such an apportionment and I think it would cast too heavy a burden on capital, if there ought to be any apportionment at all. The third method of apportionment is, in each year, to treat as a charge upon capital such a sum as, if set aside year by year and accumulated at compound interest at, say, three per cent., would produce at the end of sixty years a fund sufficient to answer by its income the annual sum of 91*l.* 11*s.* 2*d.*; in other words, to create notionally a sinking fund similar to that which was established by the 1925 Act and give the tenant for life year by year a charge upon the capital of the estate equal to the amount of the sinking fund payment. This seems the fairest method, if there is to be any apportionment. But there is no doubt that such a method of apportionment would give rise to serious complications of calculation, some of which are illustrated in the questions asked by this summons. If accounts are to be kept correctly, I think professional assistance would have to be obtained yearly even in the case of small estates, for instance when a farm is settled upon trust for the farmer's widow for life and then on his daughter for life and then on her children. In such a case the complications might impose a rather severe burden upon the successive owners. But I do not think that the mere fact that such complications would result would justify me in arriving at the conclusion that there should be no apportionment. I base my conclusion upon this, that, before 1925, tithe rentcharge was clearly a payment to be borne by the tenant for life, and that I can find nothing in the subsequent legislation which leads me to think that the substituted annual payment called a redemption annuity ought to be apportioned between capital and income. The 1936 Act, sweeping away tithe rentcharge altogether, makes provision only for this annual payment, which is to go on for a period of sixty years, without providing for any sinking fund at all. The Act provides benefits for the tenant for life even if he has to bear the whole of the redemption annuity. His annual

MORTON J.

1938

LEICESTER'S SETTLED ESTATES, *In re.* COKE *v.* EARL OF LEICESTER.

liability is reduced and the period during which it continues is shortened. I do not think that equitable principles render necessary any apportionment, and the abolition of the sinking fund payments is, to my mind, an indication that no part of the burden was intended to be borne by capital.

The result is that in my view there should be no apportionment of these annual payments between tenant for life and remaindermen. They should be borne by the tenant for life alone. Therefore there will not be recoupment to the tenant for life or to his assignees of any part of the payments made by him or them on account of the redemption annuity.

Solicitors: *Walters & Co.*

K. R. A. H.

1938
May 6, 11
July 1.
C. A.
1938
Nov. 1, 2.

In re CARTWRIGHT.

CARTWRIGHT *v.* SMITH.

[1938. C. 715.]

Will—Settlement—Conversion—Investments representing proceeds of sale of settled realty—Will in French form not executed in manner required by English law—Will effective under Lord Kingsdown's Act to pass personal estate—Will inoperative to pass the investments—Wills Act, 1861 (*Lord Kingsdown's Act*) (24 *&* 25 *Vict. c.* 114), *s.* 1*—Settled Land Act,* 1925 (15 *Geo.* 5, *c.* 18), *s.* 75, *sub-s.* 5.

S(1)(b)

A testator, who was a British subject domiciled in England, by a will made in France according to the law of France directed as follows: "I wish at my death to leave everything to my wife." The will was not executed in the manner required by English law, but was, by virtue of s. 1 of the Wills Act, 1861 (Lord Kingsdown's Act), to be held to be well executed as regards personal estate.

The testator, as tenant for life under the Settled Land Act for the time being in force, gradually realized all the freehold property comprised in his marriage settlement. There was no issue of the testator's marriage and as a result he became absolutely entitled to the investments representing the proceeds of sale of the freehold property subject to certain charges. Some of the investments had been retained to answer these charges and the rest had been handed over to the testator:—

Held (reversing the decision of Bennett J.), that the investments so retained must by virtue of s. 75, sub-s. 5, of the Settled Land Act, 1925, be treated for all purposes of disposition and devolution as real estate, and therefore did not pass under the French will.

Even if the testator had power to elect to receive the retained investments as personalty, there were no acts of his sufficient to show an intention to do so; and the language of the French will could not be relied on to show such an intention, as the will was valid in this country only for the purpose of passing personal estate, and the property could not acquire the quality of personal estate under a will which depended for its validity on the property being personal estate.

ADJOURNED SUMMONS.

The question raised by the plaintiff in this summons was whether certain investments representing capital moneys arising from sales made by her husband, as tenant for life of freehold land comprised in their marriage settlement and still remaining in the hands of the trustee of the settlement, could be disposed of under a will made by him in France according to the law of France and admitted to probate under the provisions of s. 1 of Lord Kingsdown's Act. (1)

1938
CARTWRIGHT, *In re.*
CARTWRIGHT *v.* SMITH.

By a settlement dated June 25, 1906 (hereinafter called "the settlement"), made between the husband of the first part, the plaintiff of the second part, and Phillip Charles Cartwright, the defendant Vivian Hugh Smith, Gerard Fenwick and Lambert William Middleton (hereinafter called "the original trustees") of the third part (being a settlement made in contemplation of the marriage between the husband and the plaintiff), the husband conveyed to the original trustees certain freehold hereditaments in the counties of Northampton and Oxford to hold the same unto the original trustees and their heirs subject to certain charges and incumbrances to the use of the original trustees for the term of 1000 years to commence from the solemnization of the said then intended marriage upon the trusts and subject to the powers and provisions thereinafter declared and contained concerning the same and from and after the expiration or determination of the said term and in the meantime subject thereto and to the trusts thereof to the use of the husband during his life and from and after his decease to the use of the first and every other son of the husband by the plaintiff successively in remainder one after the other according to their respective seniorities and the heirs of their respective bodies and in default of such issue to the use of the right heirs of the husband for ever and it was thereby declared that the original trustees and the survivors and survivor of them or other trustees or trustee for the time being of those presents should stand possessed of the said term of 1000 years upon

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(1) Sect. 1 of Lord Kingsdown's Act provides as follows: "Every "will and other testamentary "instrument made out of the "United Kingdom by a British "subject (whatever may be the "domicile of such person at the "time of making the same or at "the time of his or her death) "shall as regards personal estate "be held to be well executed for "the purpose of being admitted "in England and Ireland to "probate, and in Scotland to "confirmation, if the same be "made according to the forms "required either by the law of "the place where the same was "made, or by the law of the place "where such person was domiciled "when the same was made, or by "the laws then in force in that "part of Her Majesty's dominions "where he had his domicile of "origin."

1938

CART-WRIGHT, *In re.* CART-WRIGHT *v.* SMITH.

trust out of the income of the said premises to pay first an annuity of 500*l.* commencing from the death of the husband payable to the plaintiff if surviving during her life secondly a further annuity of 200*l.* commencing from the decease of the survivor of the husband and his mother payable to the plaintiff if surviving during her life or until she should marry again both such annuities to be without power of anticipation. Provision was also made for raising portions for the children or issue of the marriage and the trustees were appointed trustees of those presents for the purposes of s. 42 of the Conveyancing Act, 1881, and for the purposes of the Settled Land Acts, 1882 to 1890.

On January 6, 1935, the defendant Vivian Hugh Smith became the sole trustee of the settlement.

Between the years 1919 and 1935 the husband as tenant for life under the provisions of the Settled Land Acts for the time being in force sold from time to time parts of the freehold property settled by the settlement. The last sale was in January, 1935. As a result of such sales, by the month of January, 1935, the whole of the settled property had been sold.

The proceeds of such sales were applied so far as required in paying off certain mortgages referred to in the settlement and other liabilities. Of the balance, sufficient to provide for the annuities subsisting under the settlement and a prior rent-charge was retained and invested by the trustees, and the ultimate balance was paid over to the husband. It was assumed by the date on which such balance was so paid over to the husband that there was thereafter no possibility of issue of his marriage. The total sum so paid over to the husband amounted to 26,113*l.* 11*s.* 5*d.*

During the latter years of his life the husband resided with the plaintiff in France, but he never abandoned his English domicil or his British nationality. While so resident, the husband executed three holograph wills, all of which were validly executed according to the law of France, but were not validly executed according to the law of England. The third of the French wills provided as follows : " I wish at "my death to leave everything to my wife. Should I outlive "her I leave everything to her niece Evelyn Rich," and there followed certain provisions to take place in that event, which did not happen. The husband died on June 13, 1936, and letters of administration to his estate with the French wills annexed thereto issued on December 23, 1936, out of the Principal Probate Registry to the plaintiff.

The husband had made an English will in 1914 under which the second and third defendants claimed to be interested.

Lionel Cohen K.C. and *Wilfrid M. Hunt* for the plaintiff. The whole question is whether these investments are now personal estate and capable of being disposed of by a will admitted to probate under s. 1 of Lord Kingsdown's Act. Proceeds of sale of this kind are not in fact real estate and, there being nothing which makes them real estate, they are not excluded from the provisions of Lord Kingsdown's Act. These investments are, therefore, prima facie personal estate.

[They referred to *In re Grassi* (1); *In re Lyne's Settlement Trusts* (2); and *Chandler* v. *Pocock.* (3)]

The suggestion against the plaintiff's contention is that the investments representing the proceeds of sale must, having regard to s. 75 of the Settled Land Act, 1925, be regarded as being real estate; but for the purposes of this section money or investments representing the proceeds of sale of land must not be treated as land for all purposes.

If they had been real estate for all purposes, the testator would have had to use words of limitation if he had disposed of them in his lifetime. Investments, however, stand on a different footing. See *In re Monckton's Settlement.* (4)

The effect of that sub-section is that all its provisions operate inside the settlement. If the property does not pass under the settlement, the section has no application. The French will was only effectual to pass this property to the extent that it was the absolute property of the husband, free from the trusts of the settlement.

(1) [1905] 1 Ch. 584.
(2) [1919] 1 Ch. 80.
(3) (1881) 16 Ch. D. 648, 654.
(4) [1913] 2 Ch. 636, 646.

1938

CARTWRIGHT, *In re.*

CARTWRIGHT *v.* SMITH.

P. H. L. Brough for the sole surviving trustee of the marriage settlement.

Charles Harman K.C. and *C. V. Rawlence* for the second and third defendants.

The Settled Land Acts enabled the land to be sold without altering the rights of any one. This money was subject to the trusts of a settlement. It was not the testator's own money. [They referred to *In re Walker* (1); *In re Twopeny's Settlement. Monro* v. *Twopeny.* (2); *In re Duke of Marlborough's Settlement* (3); *Chandler* v. *Pocock* (4); *In re Duke of Cleveland's Settled Estates.* (5)]

If the investments are to be regarded as personalty, it is necessary to find out that the testator unequivocally chose to treat them as money. There is no evidence that he did.

In re Sturt (6) is a converse case.

The question turns on s. 75, sub-s. 5, of the Settled Land Act, 1925. Land replaced by an investment is, in all respects for the purposes of this sub-section, the land itself.

Cur. adv. vult.

1938. July 1. BENNETT J. The first question raised by this summons is whether certain investments, which were in fact pure personal estate, but which represent capital moneys arising from sales made by a tenant for life of settled freehold land under the powers of the Settled Land Acts, can be disposed of by a will made in France by a British subject domiciled in England and admitted to probate in England under the provisions of s. 1 of Lord Kingsdown's Act. That section reads as follows: [His Lordship read the section and continued:]

The investments in question can be disposed of by such a will if, as the plaintiff contends, they are personal estate, but not if, as the defendants Charles Henry Aubrey Cartwright and William Aubrey Cartwright contend, they are notionally freehold land.

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(1) [1908] 2 Ch. 705.
(2) [1924] 1 Ch. 522.
(3) (1886) 32 Ch. D. 1.
(4) (1881) 16 Ch. D. 648.
(5) [1893] 3 Ch. 244.
(6) [1922] 1 Ch. 416, 426.

The facts are not in dispute.

[His Lordship stated the facts and continued :]

In those circumstances this summons was issued and the first question it asks is : "Whether the residuary gift in favour "of the plaintiff in the latest of said French wills of the testator "includes all or any and what part of the investments representing part of the proceeds of sale of realty originally comprised "in the said settlement which remained and remain in the name "of the defendant Vivian Hugh Smith as the surviving trustee "of the said settlement as security for the annuities payable "under the settlement."

The answer to the question depends on the true meaning and effect of s. 75 of the Settled Land Act, 1925, and in particular on the effect of sub-s. 5 of that section. That sub-section provides : " Capital money arising under this Act while "remaining uninvested or unapplied, and securities on which an "investment of any such capital money is made shall for all "purposes of disposition, transmission and devolution be treated "as land, and shall be held for and go to the same persons "successively, in the same manner and for and on the same "estates, interests, and trusts, as the land wherefrom the money "arises would, if not disposed of, have been held and have "gone under the settlement."

It was argued on behalf of the defendants Charles Henry Aubrey Cartwright and William Aubrey Cartwright that the effect of the section was to convert the investments into freehold land, and that therefore the investments were not personal estate. The argument was based on the judgments of Sir Ernest Pollock M.R., Warrington L.J., and Sargant L.J. in *In re Twopeny's Settlement* (1), in the course of which all the members of the Court of Appeal expressed the opinion that sub-s. 5 of s. 22 of the Settled Land Act, 1882, converted into land money invested in personal securities representing capital moneys arising from the exercise by a tenant for life of the powers of sale conferred by the Settled Land Act, 1882.

It was argued that since sub-s. 5 of s. 75 is framed in substantially the same terms as sub-s. 5 of s. 22 of the Settled Land Act, 1882, I am bound by authority to give to the sub-section in the later Act the same effect that the Court of Appeal gave to the corresponding sub-section in the earlier Act.

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(1) [1924] 1 Ch. 522.

It is true that the two sub-sections, although not identical in terms, are substantially the same in their words. I do not think myself, although some stress was laid on it in argument, that any weight is to be attached to the point that, while land in the earlier sub-section meant real estate, in the later sub-section it includes a term of years. It is also true that every member of the Court of Appeal in *In re Twopeny's Settlement. Monro* v. *Twopeny* (1) expressed the opinion that the earlier sub-section did operate to convert personal securities into land. And I have no doubt that, if the law relating to the devolution of real estate had been to-day the same as it was when *In re Twopeny's Settlement* (1) was decided, it would have been my duty to act on the opinion expressed by the members of the Court of Appeal in that case and to hold that the effect of sub-s. 5 of s. 75 of the Settled Land Act, 1925, was to convert investments, representing capital moneys, into real estate. But there has been a change in the law. The devolution of real estate is now the same as that of personal estate.

It is clear, I think, that the foundation for the opinions both of Warrington L.J. and Sargant L.J. that sub-s. 5 of s. 22 of the Settled Land Act, 1882, converted investments representing capital moneys into real estate, was the provision in that sub-section that such investments are to devolve as land. That provision changed the course of devolution of personal estate. In the changed state of the law the same provision in sub-s. 5 of s. 75 of the Settled Land Act, 1925, has now no such operation. It is in fact now inoperative. It seems to me, therefore, that, the basis for the opinions expressed in *In re Twopeny's Settlement* (1) having disappeared, those opinions can no longer be used for the purpose for which Mr. Harman sought to use them on behalf of his clients.

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(1) [1924] 1 Ch. 522.

1938

CART-WRIGHT, *In re.* CART-WRIGHT *v.* SMITH.

Bennett J.

The sub-section relied on is in two parts. The first part enacts that the securities, on which an investment of capital money is made, shall, for all purposes of disposition, transmission, and devolution, be treated as land. The second part enacts that such securities shall be held for and go to the same persons successively in the same manner and for and on the same estates, interest, and trusts as the land wherefrom the money arises would, if not disposed of, have been held and gone under the settlement. Since the first part of the sub-section no longer operates to change the devolution of the securities, it cannot, in my judgment, operate to convert personal estate into real estate.

The purpose of the second part of the sub-section is plain. It is to prevent beneficial interests in land limited by a settlement of land being diverted or in any way interfered with by the exercise by a tenant for life of his statutory powers. It makes the limitation of a settlement of land attach to and operate on the property (whatever it may be) into which a tenant for life has caused the land to be changed. It has no more general or extended meaning. On the law as it now stands the provisions of sub-s. 5 of s. 75 of the Settled Land Act, 1925, do not, in my judgment, convert the securities in which capital moneys have been invested into real estate. It follows that the securities with which this summons is concerned, all of which are personal estate, were in fact capable of being disposed of by a will admitted to probate under Lord Kingsdown's Act.

In my judgment, the first question asked by the originating summons should be answered by declaring that the residuary gift in favour of the plaintiff in the last of these French wills includes all the investments in question.

J. L. D.

C. A.

The second and third defendants appealed. The appeal was heard on November 1 and 2, 1938.

Cleveland Stevens K.C. and *C. V. Rawlence* for the appellants. The question before the Court is a question of construction of the Settled Land Act, 1925, s. 75, sub-s. 5. Its effect is that capital money devolves as land, and therefore that the investments in question do not pass under Lord Kingsdown's Act. This case is covered by the decision of the Court of Appeal in *In re Twopeny's Settlement* (1), and see the converse case in *In re Kempthorne.* (2)

Lionel Cohen K.C. and *T. A. C. Burgess.* The sub-section effects a conversion for the purpose of effecting a devolution under the settlement and not dehors the settlement. Further, sub-s. 5 only operates to effect a conversion for the limited purposes of "disposition, transmission and devolution." It follows that there is no conversion that prevents the will applying to the investments in question under Lord Kingsdown's Act.

Even if s. 75, sub-s. 5, of the Settled Land Act, 1925, operates to cause capital moneys representing proceeds of real estate to be treated as real estate, any one who can claim by title paramount can take the property in the state in which it is found: *Chandler* v. *Pocock* (3); *In re Duke of Cleveland's Settled Estates.* (4) Here in the events which happened, the testator became absolutely entitled under his marriage settlement to the retained investments subject only to the existing charges, and it was therefore within his power to take the investments as personalty, and it is contended that there were acts of his showing an intention to do so. These acts were (1.) that he did not require reinvestment of the capital moneys in land, (2.) that he was party to the arrangement by which part of the investments were handed to him and part only retained to answer the charges, and (3.) that by the last of the French wills he left everything to his wife in a manner which showed that he regarded the property he was dealing with as personalty. *Meek* v. *Devenish* (5) and *In re Sturt* (6), show that the mere existence of annuities charged on the property by the settlement would not prevent election.

[CLAUSON L.J. referred to Jarman on Wills, 7th ed., vol. 2, p. 745.]

(1) [1924] 1 Ch. 522.
(2) [1930] 1 Ch. 268.
(3) 16 Ch. D. 648.
(4) [1893] 3 Ch. 244.
(5) (1877) 6 Ch. D. 566.
(6) [1922] 1 Ch. 416.

The effect of *In re Sturt* (1) is there stated.

[SIR WILFRID GREENE M.R. I can see no evidence of an election, even if it be assumed that the testator was competent to elect.]

If that be the view of the Court, it is useless to refer further to the authorities. Special reliance is placed, however, on the language of the third will made in France.

[SIR WILFRID GREENE M.R. Where Lord Kingsdown's Act is required to validate a will as regards " personal estate," that cannot include property which apart from the words of the will would be real estate.]

Here the property can be treated as converted into personal estate for the purpose of Lord Kingsdown's Act: see *In re Lyne's Settlement Trusts* (2), which shows that the test whether property passes under the Act depends on whether it would devolve on the personal representative.

Further, Bennett J. was right in saying that by reason of the change of law in regard to the devolution of real estate, the reason for the doctrine of conversion no longer existed, and that s. 75, sub-s. 5, of the Settled Land Act, 1925, did not operate to convert capital moneys into realty.

[CLAUSON L.J. The Administration of Estates Act, 1925, only affects the devolution of real and personal estate on intestacy and then causes them to devolve in the same manner.]

That is the difficulty of this argument.

Lastly, s. 75, sub-s. 5, does not, nor did the corresponding section of the Settled Land Act, 1882, convert capital moneys into " real estate " within the meaning of Lord Kingsdown's Act. All that the section does is to provide that capital moneys are to be treated as " land." " Land " is defined in s. 117, sub-s. 1 (ix.), of the Act of 1925, and it includes leaseholds. All that the section means, therefore, is that capital moneys are to be treated as immovables. Leaseholds would pass as personal estate under Lord Kingsdown's Act: *In re Grassi.* (3) This shows the importance of the use of the word " land " in s. 75, sub-s. 5, instead of " real estate," and that

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(1) [1922] 1 Ch. 416.

(2) [1919] 1 Ch. 81.

(3) [1905] 1 Ch. 584.

C. A.
1938
CARTWRIGHT, *In re.*
CARTWRIGHT *v.* SMITH.

the sub-section does not suffice to prevent s. 1 of Lord Kingsdown's Act applying.

P. H. L. Brough for the sole surviving trustee of the marriage settlement.

[No reply was called for.]

SIR WILFRID GREENE M.R. This is an appeal from a judgment of Bennett J. on an originating summons which raises several questions, the first being a question as to the operation of Lord Kingsdown's Act in the circumstances of the case. In view of the decision of the learned judge the other questions did not arise, and accordingly they have not been discussed in any way before us. As this appeal is allowed, the summons will have to go back to the learned judge to be dealt with on the basis of our decision.

The facts are not at all complicated. On June 25, 1906, there was executed the marriage settlement of Mr. Aubrey Ralph Thomas Cartwright and Mrs. Sophia Frances Trotter, who was a widow. Under that settlement certain freehold estates were settled to uses under which the settlor, the husband, was entitled to an estate in fee simple by virtue of the rule in *Shelley's Case* (1), but that estate in fee simple was liable to be divested in the event of there being issue of the marriage; in other words, the limitations, putting them quite shortly, were to the use of the husband for life with remainder to the use of the heirs of his body in succession in tail, and an ultimate remainder to the husband himself. The settlement also created certain charges upon the land, the only charge actually subsisting at the date of the settlor's death being a charge of two annuities in favour of his widow. There was a pre-existing charge in favour of his aunts on part of the settled land. The settlor, the husband, died on June 13, 1936, leaving his widow, the present plaintiff, but no issue, surviving him. There never was any issue of the marriage. He left brothers, of whom the defendant, Charles Henry Aubrey Cartwright, is the oldest, and he has an infant son, the infant defendant, William Aubrey Cartwright. They

(1) (1581) 1 Co. Rep. 93a, 101.

are parties as being interested under an English will which the settlor made in 1914. That was a will under which he dealt with his interest in the real estate which was settled by the marriage settlement. It has not yet been proved for reasons which will appear. As I have said, he made a will in 1914 at a time when the land remained unsold, but between 1915 and January of 1935 the settlor, in exercise of his powers as tenant for life, sold the whole of the settled land, and when he died the settled estates were entirely represented by investments. In view of the circumstance that there was believed to be no possibility of issue, in which event the settlor would become absolutely entitled subject only to the charges I have mentioned, a considerable portion of the investments which had been made of the proceeds of sale was handed over to the settlor in his lifetime. There were retained in the hands of the trustee sufficient investments to meet the subsisting charges on the settled property, and it is with regard to those investments that the present question arises.

The settlor in the latter years of his life apparently lived in France although he does not appear to have lost his English domicil. While in France he made three wills which satisfied the laws of France as to the forms of wills and as to the manner of their execution, but which did not satisfy the Wills Act. The first of those wills is dated January 2, 1926, and under it he revokes his previous will and leaves all his furniture and effects to his wife " with power of disposal as "she may wish, absolutely nothing to my other brothers and "sister." The second will was dated November 1, 1933, and it provided for the event of his surviving his wife, which did not happen. The last will was dated November 22, 1934, and it begins by saying: " I wish on my death to leave "everything to my wife." I need not refer to the other provisions of the will. Those wills, not being executed in accordance with the Wills Act, can in the circumstances acquire validity only by reason of the provisions of Lord Kingsdown's Act. Lord Kingsdown's Act (24 & 25 Vict. c. 114), provides: [His Lordship read s. 1]. As I have said, these wills were made according to forms required by the law of the place where they were made, namely, France, and, therefore, by virtue of that section the wills are well executed for the purposes of being admitted to probate but only as far as regards personal estate. Therefore, the question which arises and which falls to us for decision is: ought the settlor's interest in the investments, which at the date of the settlor's death were in the hands of the trustee and represented proceeds of sale of the real estate, to be regarded, for the purposes of Lord Kingsdown's Act, as personal estate or not? The learned judge held that the settlor's interest in the investments in question was, for the purposes of Lord Kingsdown's Act, personal estate upon the ground that the Administration of Estates Act, 1925, has struck at the whole foundation of the doctrine of conversion in such a case as the present. That decision I shall deal with in due course. It was a decision on the point which, as I understand, was not argued before the learned judge and I shall, therefore, deal with the matter apart from that point first. Prima facie one would have thought, approaching this matter without too much research or reflection, that money which represents the proceeds of sale of settled real estate ought in law, having regard to the relevant provisions of the Settled Land Act, to be regarded as real estate, and that, being so regarded, property of that character should not be regarded as personal estate within the true meaning of Lord Kingsdown's Act; but it is said that that is not so, and apart from the reasons on which the learned judge decided the case, three points were taken by Mr. Cohen.

I will take the last point first, because it appears to me to come logically first. It was to this effect, that the relevant provisions of the Settled Land Act, which deals with what I may be permitted to call the status of the proceeds of sale of settled land, does not operate to convert those proceeds into real estate at all. If that view were correct, the interest of the settlor in the investments in question would have been, in the eye of the law, personal estate and, therefore, Lord Kingsdown's Act would have had the result of making the will a good will with regard to it for the purposes stated in the Act. I must confess that when that argument was put forward, it struck me as being a revolutionary one, and as one which destroyed a view which had, rightly or wrongly, impressed itself for many years on one's mind. The section of the present Settled Land Act, that of 1925, which is the only one to which I need refer—I need not go back to the Act of 1882—is s. 75, sub-s. 5, and it provides as follows: "Capital "money arising under this Act while remaining uninvested "or unapplied, and securities on which an investment of any "such capital money is made shall for all purposes of disposition, "transmission and devolution be treated as land, and shall be "held for and go to the same persons successively, in the same "manner and for and on the same estates, interests, and trusts, "as the land wherefrom the money arises would, if not disposed "of, have been held and have gone under the settlement." That is a provision the object of which would strike the mind, I think, as being intended to produce the same result in every respect as though capital moneys coming into existence through the exercise of the statutory power retained the character of the land from which they had been derived. As Clauson L.J. pointed out in the course of the argument, the practice of inserting in settlements trusts for re-investment in land of capital money arising under powers of sale in the settlements was a common one. Certainly, speaking for myself, I have always understood and thought that the object of this section was similarly to preserve the legal character of settled land notwithstanding its conversion into capital money. There are obvious reasons why the Legislature should have so provided if injustice was to be avoided. Therefore, I am of opinion that the effect of this provision is the same as it would have been, at any rate for the purposes of the present question, if there had been an express trust for investment in real estate. That conclusion is, I think, one which, even if I were not disposed to come to it myself, I should be compelled to adopt in view of the decision of this Court in the case of *In re Lyne's Settlement Trusts.* (1) Mr. Lionel

(1) [1919] 1 Ch. 81, 97.

Cohen made a courageous effort to avoid that conclusion by laying emphasis upon the word "land" in the sub-section, for as I have said, the sub-section provides "capital money ". . . . shall for all purposes . . . . be treated as land" and "land," he says, includes leaseholds. Then he says: What right, therefore, have we to say that this capital money is to be treated as real estate when the section provides that it is to be treated as land which would include leaseholds? It seems to me with all respect to that argument that the word "land" must be construed and given effect to in relation to the particular facts of the case, and, where you are dealing with a settled freehold which is sold, the capital money would be treated as freehold, and, where you have a settled leasehold which is sold, the capital money would be treated as leasehold and so forth. It seems to me that there is no real difficulty in the construction of the sub-section. That argument, therefore, in my opinion fails.

The next argument is the one which came first in order of time, that sub-s. 5 of s. 75 of the Settled Land Act, 1925, only effects conversion for the purposes of disposition, transmission and devolution under the settlement itself, and does not operate to affect the nature of capital money and its disposition, transmission and devolution for any purpose outside the settlement. I have some difficulty in following the logic of that argument in the circumstances of this case. At the date when the settlor died there was in existence property which for the purposes of this argument is to be assumed to have been at that moment in the eye of the law real estate. The question is: Is that property personal estate for the purpose of Lord Kingsdown's Act? If in the eye of the law it was at that moment real estate, the answer is in the negative. I cannot see how there is any room for a suggestion that in some way or another what we are dealing with here is something outside the four corners of the settlement altogether. If you have something which had got out of the settlement, so to speak, there is nothing left for sub-s. 5 to operate upon, but when you look at the critical moment, namely, the moment of death, and ascertain what was the nature of the property at that moment, it seems to me that the answer is quite clear.

The next argument which was, I think, the one on which most reliance was placed, was to this effect: it was said that upon the facts of the case, and having regard to the limitations in the settlement, the settlor at the date of his death was absolutely and indefeasibly entitled to the settled property, subject to the annuities charged in favour of his widow, and subject also to the rentcharge which belonged to his aunts and was charged on the land under an earlier document. Some question was raised as to whether or not the marriage settlement did not charge that rentcharge, which had previously been charged only on part of the settled land, upon the entirety of the settled land. That is a question into which it does not seem to be necessary to go. One reason why it was said he was indefeasibly entitled was this: it was said that at the date of his death there was no possibility of issue of the marriage, and on the basis of there being no issue he was, of course, entitled indefeasibly under the rule in *Shelley's Case* (1) to an estate in fee simple. I am going to assume in Mr. Lionel Cohen's favour two matters, as to which it must not be thought for one moment that I am satisfied. The first matter is that on the facts there is evidence, or sufficient evidence, from which the Court ought to draw the conclusion that there was no possibility of issue at that time.

On the evidence I should have thought that that had not been established, but I will assume for the purpose of testing the argument that it was so. The other matter which I will, for the purpose of argument, assume in Mr. Lionel Cohen's favour is that for the purpose of the doctrine which I am about to examine, a person who at his death has an estate in fee simple subject to its being defeated by the birth of issue to himself, must be treated nevertheless as being indefeasibly entitled if it is shown that his surviving widow cannot have issue of the marriage. Obviously, if there was possibility of issue, you could not say of the husband at the moment of his death that he was dominus of the settled

(1) 1 Co. Rep. 93a, 101.

funds, because in due course there might be born issue which would defeat his estate; but I will assume, without expressing any opinion upon it, that Mr. Lionel Cohen would be right in such a proposition. Then he says this: Let it be granted that under the relevant provision of the Settled Land Act these investments were, in the eye of the law, real estate; it is always competent to a person absolutely entitled to property subject to a trust for conversion, to elect to take that property in its unconverted state. No difficulty arises in the case of a person absolutely entitled. Quite clearly he can so elect, and whether or not he has elected may be a question in any individual case, but his ability and capacity to elect is beyond question. However, it is a very different matter when you come to a person who is not absolutely entitled. In the present case, if the points which I have for the sake of argument assumed in Mr. Cohen's favour were decided against him, the result quite clearly would be that at his death the settlor was not absolutely entitled to these proceeds of sale, and on that basis he would not, in my opinion, have been entitled to elect to retain the proceeds of sale in their then condition, and thus put an end to the statutory direction to convert. The reason why he could not do so would be that there were other persons interested under the settlement in the execution of that trust. The matter is discussed with great lucidity in the judgment of Peterson J. in *In re Sturt.* (1) I do not think it is necessary to cite anything from that decision. The matter is succinctly stated in Jarman on Wills, 7th ed., vol. 2, p. 745. Before I read that short passage, I wish to refer to one other point which comes into this argument, and it is this. It is said by Mr. Lionel Cohen that a person who is at his death contingently entitled, may indicate his intention that the trust for conversion shall come to an end in the event of that contingency being fulfilled. It is really in connection with that argument that I wish to read the passage from Jarman. He says: " If the "whole of the proceeds are given to A, on a contingency, "and on failure of that contingency to others, the primary

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(1) [1922] 1 Ch. 416.

"donee may, pending the contingency, declare his intention "to keep the land unsold, so as upon the happening of the "contingency before his death to reconvert the land, if no "sale has been (as of course it may nevertheless have "been) previously made." In the present case, making the assumptions which I have mentioned in Mr. Cohen's favour, it is necessary to examine what the alleged acts are which are said to indicate an intention on the part of the settlor to effect a reconversion. If those facts are insufficient for the purpose, the argument must necessarily fail, and it becomes unnecessary to examine the correctness of the other propositions on which the argument rests.

The facts relied upon for producing that result are simply these: first, that the settlor had been party to the transaction under which the rest of the settled funds had been handed over to him leaving only the portion now in question in the hands of the trustees, secondly, that he did not require, as he could have done, that the funds should be invested in land and, thirdly, that he made the French wills using the language to which I have referred. Those considerations appear to me to be quite insufficient to produce the result desired. The fact that he dealt with the part of the settled property, which was assumed to be free, in the way he did, appears to me to throw no light whatsoever on any intention on his part with regard to the part that was not regarded as free. The fact that he did not direct the investment in land is entirely colourless. The fact that he used certain expressions in his French will which, as a matter of language, would appear to show an intention to deal with everything that he owned, cannot in my view operate so as to produce a reconversion, or to put an end to the statutory obligation to convert, whichever way one regards it, and for this reason: the question whether or not language used in a will is sufficient to indicate an intention on the part of a person (assumed otherwise to be competent) to effect a reconversion, is, of course, a question of the true construction of that will, but in the present case there is a further factor in the situation, and that is Lord Kingsdown's Act. The question is: What is the meaning of "personal estate" in s. 1 of Lord Kingsdown's Act? Must the estate be personal estate, apart from and independently of anything in the will itself; must it, so to speak, pre-exist and be personal estate without reference to the will; or do the words in s. 1 include something which, by reason of the very will itself to which it is sought to apply Lord Kingsdown's Act, acquires the character of personal estate? The latter contention is what the argument implies in so far as it relies on the directions in the will. It says: This is personal estate for the purpose of Lord Kingsdown's Act, and the reason why it is personal estate for the purpose of Lord Kingsdown's Act is that the settlor, being competent to do so, has in the will itself expressed the intention that personal estate it shall be. That seems to me to be entirely illegitimate, because before a thing can become personal estate the will must be valid for the purpose of dealing with that personal estate under Lord Kingsdown's Act, and you cannot acquire by virtue of the very will you are seeking to validate under that Act the quality of personal estate which the Act requires before the will can be valid. The argument appears to me to fail when that point is remembered, but quite apart from that consideration, and looking altogether at the various matters relied upon as indicating an intention to effect a reconversion, I am quite unable to take the view that the facts relied upon are sufficient.

The last matter is the point on which Bennett J. decided the case. Shortly it was this, that as the result of the alteration in the law relating to devolution on intestacy which was made by the Administration of Estates Act, 1925, the distinction between real and personal estate for present purposes must be treated as having ceased to exist. It seems to me, with all respect to the learned judge, that he was under a misapprehension as to the effect of the Administration of Estates Act. The Administration of Estates Act did not provide that thenceforward real property and personal property were to be the same, or that real property was not to exist, or something of that sort. It did not provide anything of the kind. All that it provided was that property which under

C. A.
1938
CARTWRIGHT, *In re.*
CARTWRIGHT *v.* SMITH.

Sir Wilfrid Greene M.R.

the previous law had gone to one particular class of persons, should thenceforward go to a different class of persons on an intestacy, and to argue from that that there is no room for the application of the doctrine of conversion in a case such as the present, appears to me, with all respect to the learned Judge, quite illegitimate.

In the result, the appeal must be allowed, and the appropriate declaration made.

SCOTT L.J. I agree with the judgment that has been delivered.

CLAUSON L.J. I agree with the judgment delivered.

Appeal allowed.
Leave to appeal to the House of Lords.

Solicitors: *Petch & Co.*; *Pennington & Son.*

H. C. G.

CO., LTD. v. SURBITON BOROUGH SURBITON B. C. [1948] 1 Ch. 869 TON B. C.
CIL. [1948] 1 All E.R. 876. [1949] 1 Ch. 180

LUXMOORE J.
1938
July 11.
12, 28.

ATTORNEY-GENERAL v. BARNES CORPORATION AND RANELAGH CLUB, LIMITED.

[1938. A. 276.]

Local Government—Town planning—Land privately owned used as a club—Resolutions to prepare scheme—Subsequent negotiations with owners for town planning the land—Appointment of sub-committee by local authority—Agreement negotiated by sub-committee with owners—Ratification by local authority—Delegation—Validity of agreement after resolution adopting draft scheme—Town and Country Planning Act, 1932 (22 & 23 *Geo.* 5, *c.* 48), *ss.* 34, 48—*Local Government Act,* 1933 (23 & 24 *Geo.* 5, *c.* 51), *s.* 85.

A borough council (being a local authority for the purposes of the Town Planning Acts) in 1934 resolved to prepare a draft town planning scheme for their borough. The scheme included a large area of open land privately owned and used as a high-class sporting and social club. The Council, having approved of the draft scheme, appointed a town planning committee from their number, and late in 1934 appointed a town planning scheme clauses sub-committee consisting of five members of the Council who were also members of the town planning committee. Early in 1935 negotiations took place between the sub-committee and the club with reference to their property being scheduled to the proposed town planning scheme as a public or private open space, and from time to time members of the sub-committee met representatives of the club for this purpose.

In June, 1935, at a meeting between representatives of the Council and the club, it was agreed that an appropriate way of settling the matter would be by an agreement between the Council and the club with a view to the property of the club being town planned, and a draft of the proposed agreement was prepared and discussed. In July, 1935, the Council resolved that pursuant to s. 34 of the Town and Country Planning Act, 1932, the agreement with the club should be entered into, subject to questions affecting (*a*) the area to be built on, (*b*) height of buildings, and (*c*) flood protection, being negotiated by the sub-committee with the representatives of the club, with power for the sub-committee to settle such questions, and that on completion the club's property should be included in the proposed town planning scheme subject to the terms of the agreement. On August 1, 1935, this agreement was sealed by the mayor on behalf of the Council. The agreement contained numerous clauses concerning the possible development of the club's property on town planning lines, with restrictions regarding the nature of the buildings likely to be erected, the area to be developed, and other matters.

An action was instituted by the Attorney-General at the relation of T., a ratepayer of the borough, claiming a declaration that the appointment (as was alleged) of the members of the sub-committee and the representatives of the club as a joint committee was ultra vires, that the powers of the Council had been improperly delegated to the so-called committee, and that the agreement was ultra vires the Council and therefore unenforceable and void :—

Held, (1.) that no question of delegation by the Council to the so-called committee had arisen under the Town and Country Planning Act, 1932, s. 48, so as to invalidate the agreement of August 1, because no committee had ever been appointed under s. 48, and no power to enter into an agreement under s. 34 of the Act of 1932 was ever delegated to any committee by the Council. The Council itself had authorized the agreement, the mayor having duly sealed it on behalf of the Council, following a resolution of the Council. (2.) that there was nothing in s. 34 of the Town and Country Planning Act, 1932 (which provides that a local authority may enter into an agreement with the owner of land who is willing to permit his land to be made subject to conditions restricting its development and use in a manner which might be dealt with by a scheme under the Act) to prevent the Council from making the agreement of August 1 with the club to restrict its prima facie right to plan or develop its property, because the restrictions were such as might be dealt with under a scheme under the Act of 1932. Further, the fact that a provisional town planning scheme had been already adopted by the Council relating to the land in question could not affect the agreement, which could be entered into apart from the provisional scheme.

ACTION.

This action was brought by the Attorney-General at the relation of one J. R. Thomas, a ratepayer of the defendant borough, the borough of Barnes, against the Barnes Borough Council (hereinafter called " the Council ") claiming (inter alia) a declaration (*a*) that the appointment by the defendant Council in or about May, 1935, of five representatives to constitute with four representatives of the club (the second named defendants), the Ranelagh Club, Ld. (who had been added by amendment dated February 21, 1938), a joint committee to make and/or negotiate an agreement under the Town and Country Planning Act, 1932, s. 34 (1), was ultra

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(1) Town and Country Planning Act, 1932, s. 34 : " (1.) Where any "person is willing to agree with "any such authority as is mentioned in sub-section (2.) of this "section that his land, or any part "thereof, shall, so far as his "interest in the land enables him "to bind it, be made subject, "either permanently or for a

LUXMOORE J.
1938
ATTORNEY-GENERAL
v.
BARNES CORPORATION AND RANELAGH CLUB, LD.

vires the defendant Council, and that all acts done by the joint committee and all acts of the defendant Council founded thereon were ultra vires; and (*b*) that the making of two agreements dated respectively August 11, 1935, and January 24, 1936, both being made between the defendant council and Ranelagh Club, Ld., were ultra vires the defendant Council and that the defendant Council was not bound by either of the two agreements. No relief was actually claimed against the second named defendants (the Ranelagh Club, Ld.), who had been added as defendants at their own request.

The following statement of facts is taken substantially from the judgment of the learned judge:

On September 11, 1923, the Council by resolution of that date decided to prepare a town planning scheme in pursuance of the Housing and Town Planning Act, 1919, s. 42, with reference to the areas situate wholly within the urban district of the borough and coloured pink on a map which was marked and certified by the clerk to the Council on that date as map No. 1. On February 24, 1924, the Council resolved that the draft preliminary statement required by the Housing and Town Planning Acts, 1909 to 1919, should be provisionally approved, and that after the advertisements and notices required by the Acts had been given, the draft should be submitted to the Council for final approval. On April 8, 1924, a further preliminary statement and map No. 2, referred to in such statement, were adopted by the Council. The property of the club was included in the said preliminary statement and map No. 2 as an area having a density of twelve houses

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"specified period, to conditions "restricting the planning, development, or use thereof in any "manner in which those matters "might be dealt with by or under "a scheme, the authority may, if "they think fit, enter into an "agreement with him to that "effect, and shall have power to "enforce the agreement against "persons deriving title under him "in the like manner and to the "like extent as if the authority "were possessed of, or interested "in, adjacent land and as if the "agreement had been entered into "for the benefit of that adjacent "land.

"(2.) Agreements may be "entered into under this section "by a local authority, a county "council, or a responsible "authority, not being a local "authority or a county council."

to the acre. On November 8, 1927, the Council decided to prepare a further town planning scheme, referred to as the Barnes Town Planning Scheme No. 2.

On February 9, 1932, the Council resolved among other things that the property belonging to the club (which is referred to in the minutes of the meeting of the Council as "Barn Elms Park") should be zoned as a residential area with eight houses to the acre, but that notwithstanding the fact that such property had been zoned for residential purposes every endeavour should be made at the appropriate time to secure it as a public open space. On April 12, 1932, the Council resolved that the town planning schemes No. 1 and No. 2 should become one scheme, to be known as "Barnes Town "Planning Scheme 'A,'" and that the draft of such scheme which had been prepared by the town planning committee of the Council should be adopted; and that the map marked No. 3 to which the draft scheme referred should be signed and certified by the clerk to the Council. The draft scheme and the map numbered 3 were duly signed and certified in accordance with the last mentioned resolution and include the property belonging to the club (which is coloured orange on map No. 3) as an area in which the average number of dwelling-houses to the acre is not to exceed eight. The draft scheme also provides that the character of the buildings which might be erected on the property of the club (*a*) without the Council's consent are dwelling-houses and residential buildings and (*b*) with the Council's consent are buildings other than dwelling-houses and buildings for noxious trade or industry, while buildings for noxious trade or industry are prohibited.

On February 14, 1934, the Council resolved that the town planning scheme "A" should be amalgamated with another proposed town planning scheme under consideration by the Council and known as scheme No. 3. On November 9, 1934, the Council resolved that nineteen named persons who were members of the Council should constitute a town planning committee, the duties of such committee being to consider and advise the Council on all questions that might arise with reference to the Barnes town planning scheme. On December 12, 1934, the Council appointed five named members of the Council (who were also members of the town planning committee) to be a sub-committee to be known as the "town "planning scheme clauses sub-committee"; while on the same date the Council resolved to apply to the Minister of Health for authority to dispense with the preliminary statement for scheme No. 3, and to proceed direct to the preparation of a draft scheme for the whole of the areas comprised in town planning scheme "A" and scheme No. 3. It was further resolved that, to facilitate the combining of the schemes in one scheme for the whole of the borough, application should be made to the Minister of Health under the Town and Country Planning (General Transitional) Order, 1933, to extend the time for the preparation, adoption and approval of the combined scheme. It is agreed that the necessary authority and extension of time were given by the Minister of Health. On January 8, 1935, the town planning scheme clauses sub-committee resolved that the club should be approached with reference to the property of the club being scheduled to the proposed town planning scheme as a private or public open space as proposed in the resolution of the Council of February 9, 1932, to which I have already referred. After January 8, 1935, the town planning scheme clauses sub-committee from time to time met representatives of the club. There are in existence documents which refer to these meetings as meetings of a joint committee of the Council and the club.

As a result of these meetings the town planning scheme clauses sub-committee reported to the Council that the zoning of the property of the club as a public or private open space without the full acquiescence of the club would be too large a matter for the Council, and that the club would not acquiesce in such zoning. The sub-committee further reported that certain proposals for the future development of the property of the club had been placed before the sub-committee, and that it had been suggested that at the outset a small committee of the Council should co-operate with a small committee of the club as a joint committee. It is to be noted that nothing is said as to the precise constitution of such a joint committee, nor as to its personnel. On May 20, 1935, at a special meeting of the Council, which had been convened by a notice to consider and to take any action necessary upon a report of the town planning scheme clauses sub-committee regarding a proposed development of the property of the club, the Council resolved that the town planning scheme clauses sub-committee be authorized to continue their negotiations with the club and report to the town planning committee in due course. As a result of the discussions between the town planning scheme clauses sub-committee and the representatives of the club subsequent to the resolution of the Council of May 20, 1935, it was agreed that a memorandum should be prepared with regard to the future development of the property of the club. In due course a memorandum was prepared and was subsequently submitted to the Council.

On June 12, 1935, the Council resolved that authority should be given for the preparation in conjunction with the club of detailed proposals for consideration by the Council with a view to the property of the club being ultimately town planned in accordance with the terms of the said memorandum. At a meeting of representatives of the Council and of the club on June 25, 1935, it was suggested that the most appropriate method of dealing with the questions arising between the Council and the club would be for an agreement to be entered into between the Council and the club under s. 34 of the Act of 1932 (1), and a draft of such an agreement was prepared and discussed. The draft agreement was further discussed between the representatives of the Council and the club subsequently to June 25, 1935; and on July 31, 1935, the Council resolved that pursuant to s. 34 of the Act of 1932 (1) the Council should enter into an agreement with the club relating to the property of the club embodying the provisions contained in the draft agreement which had been submitted to the meeting, subject to questions respecting (*a*) the area permitted to be built on, (*b*) the height of buildings, and (*c*) flood protection, being negotiated by the town planning scheme clauses sub-committee with power to that sub-committee to settle; and that, on the said agreement being completed, the property of the club should be included in the Council's draft town planning scheme subject to the terms of the said agreement, and that the mayor be thereby authorized to affix the corporate seal to the agreement. Subsequent to the resolution of the Council the town planning scheme clauses sub-committee on July 31, 1935, after negotiation with the representatives of the club, agreed with regard to the matters referred to in the resolution of the Council.

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(1) See note (1) ante, p. 111.

On August 1, 1935, the mayor in pursuance of the resolution of July 31, 1935, affixed the seal of the corporation to an agreement dated August 1, 1935, and expressed to be made between the second-named defendants, the Ranelagh Club, Ld. (thereinafter referred to as "the owners"), of the one part and the first-named defendants, the Barnes Borough Council (thereinafter referred to as "the Council"), of the other part. The agreement contained recitals to the effect that the Council and the owners had mutually agreed to enter into the agreement pursuant to the powers for that purpose conferred by the Town and Country Planning Act, 1932, s. 34 (1), and all other powers them enabling, and provided by clause 2 that the owners, in consideration of the covenants on the part of the Council thereinafter contained, thereby agreed with the Council that (sub-clause (i.)) the Ranelagh Club estate should, subject to the provisions of clause 4, be (inter alia) permanently subject to the conditions restricting the planning, development and use thereof contained in sub-clauses (ii.) to (x.) of the clause inclusive, and that such restrictions (subject as aforesaid) should be enforceable by the Council against the owners and persons deriving title under them in like manner and to the like extent as if the Council were possessed of or interested in land adjacent to the estate and the agreement were entered into for the benefit of such adjacent land. Sub-clause (ii.) dealt generally with the preparation of a plan showing the proposed general scheme of development of the estate

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(1) See note (1) ante, p. 111.

(excluding an area called the "central area"), such general lay-out plan to be subject to the Council's approval. The sub-clause dealt further with the types of dwelling-houses to be erected, control of buildings, area to be developed, etc. Other sub-clauses dealt with the lay-out plan, its general features, powers of the Council to control development, etc.; the retention of the area known as the "central area" as a social club, and its future possible purchase as an open space. Certain options were given to the Council by sub-clause (viii.) as regards a certain area called the "riverside area." By clause 4 (1), the terms of the agreement might be varied by either party or extended. The second schedule contained the restrictions on the planning, use and development of the estate as regards buildings, roads, etc.

Hon. Sir Stafford Cripps K.C. and *Eric H. Blain* for the plaintiff. The delegation by the Council (which resulted in the two agreements) to the joint committee was ultra vires the powers of the Council. Three-quarters of the members of the committee were not members of the appointing authority. In fact there was only one councillor on the committee. These agreements were made without regard to the provisions of s. 48 of the Town and Country Planning Act, 1932 (2), and were in contravention of the section. The Council were purporting to appoint this joint committee under s. 48. (2)

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(1) The material terms of the agreement are further referred to in the judgment of the learned judge at p. 129.

(2) Town and Country Planning Act, 1932, s. 48: "(1.) A local "authority or a county council "may, subject to the provisions "of this section, appoint a com-"mittee for any of the purposes "of this Act, which, in the opinion "of the authority, would be better "regulated and managed by means "of a committee, and may delegate "to the committee, with or with-"out restrictions or conditions as "they think fit, any of their "powers under this Act except the "power of levying a rate or bor-"rowing money, or of relinquishing "in favour of the council of the "county any of their powers and "duties under this Act.

"(2.) A committee appointed "under this section shall consist "of such number of persons as the "appointing authority think fit, "but at least three-fourths of the "members of the committee shall "be members of the appointing "authority."

The resolution of the Council of May 20, 1935, must be looked at. By this resolution the Council resolved (after receiving a report of the Council while in committee) " that the report be "received, and that the town planning scheme clauses sub-com- "mittee be authorized to continue their negotiations with the "Ranelagh Club, and report to the town planning committee "further in due course." The whole initiation of the agreement was, it is submitted, illegal because the decision to enter into it, the very first step of all, was not taken by the Council itself, but by the joint committee, subject only to the subsequent ratification by the Council. The power under this section is purely statutory, and therefore no proceedings at all can be conducted except strictly in conformity with the terms of the statute. In this statute there is no authority to set up any joint committee with anybody except another local authority. There is no authority to set up a joint committee with a landowner to be found anywhere in the Act. The agreement therefore was ultra vires the powers of the Council.

Again the agreements were not in fact properly authorized by s. 34 of the Act of 1932 (1) ; the planning referred to in these agreements is really only permissive. The section cannot be used in substitution for an interim development order. It cannot be used by an authority so as to enable them to agree with a landowner upon some form of development which he may want to make and which is not permitted by the scheme in the state in which that scheme is at the date of the agreement. The section is only intended to deal with land becoming more restricted in its development or use than it was at the date when the agreement was entered into. It relates to those cases where the land in question (the subject of the agreement) has been already included in a provisional town planning scheme and the owner agrees to enter into additional restrictions. If an agreement were to be entered into at the last moment with a landowner whose land was proposed to be included in a town planning scheme, persons interested in the proposal might well be prevented from putting forward objections to the agreement. If an

(1) See note (1) ante, p. 111.

agreement of this kind is entered into and preferential terms are granted in any way, it might possibly be to the disadvantage of neighbouring landowners. This particular agreement of August 1, 1935, was not a restrictive one at all when the town planning scheme has been taken into consideration. It simply permitted the Ranelagh Club to develop its land without being obliged to obtain an interim development order. It was therefore merely permissive. The provisions of the agreement of August 1, 1935, could not have been obtained under the Act of 1932, they could not have been incorporated in a town planning scheme under the Act. (1) The ambit of agreements under this section cannot be broadened to the prejudice of neighbouring landowners. If a town planning scheme has once been established for a particular area of land, the land cannot be withdrawn and the owner get some kind of preferential treatment.

Cyril Radcliffe K.C. and *Wilfrid M. Hunt* for the defendants, the Barnes Borough Council. The seal of the corporation was affixed to the agreement of August 1, 1935, by the mayor by virtue of the authority of the whole Council at their meeting on July 31 (the previous day). The only delegation was when by their resolution of that day they referred three minor points (really drafting points on the agreement) to the town planning scheme clauses sub-committee. The section giving power to delegate to committees is s. 85 of the Local Government Act, 1933 (2), which is in Part III.

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(1) For the material terms of the agreement see the passage in the judgment of the learned judge at p. 129.

(2) Local Government Act, 1933, s. 85: "(1.) A local authority "may appoint a committee for "any such general or special "purpose as in the opinion of the "local authority would be better "regulated and managed by "means of a committee, and may "delegate to a committee so "appointed, with or without "restrictions or conditions, as they "think fit, any functions exercisable by the local authority either "with respect to the whole or a "part of the area of the local "authority, except the power of "levying, or issuing a precept for, "a rate, or of borrowing money.

"(2.) The number of members "of a committee appointed under "this section, their term of office, "and the area, if any, within which "the committee is to exercise its "authority, shall be fixed by the "local authority.

"(3.) A committee appointed "under this section (other than a "committee for regulating and

LUXMOORE J.
1938
ATTORNEY-GENERAL
v.
BARNES CORPORATION AND RANELAGH CLUB, LD.

of the Act and is headed "Committees and Joint Committees"—"General power of local authorities to appoint "committees." That is a general power, but the Council has also got special powers for purposes of this kind under s. 48 of the 1932 Act. (1) This town planning scheme clauses sub-committee was given a power to settle, and the persons who had this power and act for the Council were members of the town planning committee. The only power of delegation was to settle the three minor points above referred to. The whole Council could not act as negotiators; some one else has to prepare the form of the agreement. The appointment of what has been called a joint committee was only derived from the powers vested in the Council. To make it (strictly speaking) a joint committee, there must be the appointment of it as a joint committee. A most astonishing result would follow if they could bind either side, the Council or the Ranelagh Club. This committee had never anything but advisory powers, an advisory body having under it (so to speak) a sub-advisory body, compare s. 48 of the Act of 1932. (1) The committee appointed by the Council under this section is only for the purposes of the Act. The resolution of the Council on May 20 (if read correctly) simply tells the committee to continue negotiating. It is the negation of delegation.

On the question of the argument put forward on behalf of

"controlling the finance of the "local authority or of their area) "may include persons who are "not members of the local authority:

Provided that at least two-thirds "of the members of every committee shall be members of the "local authority.

"(4.) Every member of a committee appointed under this "section who at the time of his "appointment was a member of "the local authority by whom he "was appointed shall, upon ceasing to be a member of the "authority, also cease to be a "member of the committee: "Provided that for the purposes "of this section a member of a "local authority shall not be "deemed to have ceased by reason "of retirement to be a member of "the authority, if he has been re-"elected a member thereof not "later than the day of his retirement.

"(5.) Nothing in this section "shall authorise the appointment "of a committee for any purpose "for which the local authority are "authorised or required to appoint "a committee by any other enactment (including any enactment "in this Act) for the time being in "force."

(1) See note (2) ante, p. 117.

the plaintiff that the land restricted by this agreement is subject to some prior restriction at the date when the agreement is entered into, it is submitted that this is not so; you must begin from the actual beginning of a scheme when the landowner is restricting himself as to the development of his land.

With regard to the meaning of s. 34 of the Act of 1932 (1), it is submitted that, until a scheme has been made, the land qua the scheme is wholly unrestricted, and the landowner can do exactly as he likes with it as owner in relation to planning or development. He may have to get an interim development order to be entitled to compensation if a final scheme were to be enforced against him. [The various sections of the Act were referred to seriatim.] Sect. 34 is wide in its terms; it was made to give the authority power, without waiting for a scheme, to make an agreement with a landowner who might be willing to agree at once. If the landowner—the land being unrestricted—agrees to his land being regulated, that, it is submitted, must be a restriction. For the effect of these town planning schemes, see *In re Forsey and Hollebone's Contract* (2) and *Markham* v. *Derby Corporation.* (3)

The agreement must be carefully scrutinized. The substance is that the owner voluntarily offers not to do what he can do with regard to the use of it; he submits to a scheme of development and a proper regulation of the development of the estate and in accordance with a plan. The contents of this agreement could quite properly be incorporated in a town planning scheme; it is in fact a little town planning scheme in the form of an agreement for this property. So far as the section itself is concerned, it is wide enough to cover any agreement.

Sir Patrick Hastings K.C. and *J. H. Stamp* for the second defendants, the Ranelagh Club. The agreement clearly falls within s. 34. (1)

Hon. Sir Stafford Cripps K.C. in reply. The joint committee was delegated by the Council to deal with the matter of the regulation and development of the Ranelagh Club. That matter, namely a sectional scheme, was one to be carried out by the Council; they delegated their powers to this joint committee. The matter so delegated was one of the purposes of the Act, s. 48 (1), which was to be carried out by the Council. The joint committee appointed need not necessarily be a committee of the Council. The whole proceeding was diverted into a s. 34 procedure (2) instead of a special scheme under the Town Planning Act. The decision never came before the Council at all.

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(1) See note (1) ante, p. 111.

(2) [1927] 2 Ch. 379.

(3) [1935] Ch. 320.

The operations of the joint committee quite clearly fall within the initial words of s. 48, sub-s. 1. (1) The joint committee arranged the matter with the Ranelagh Club; they managed it. The matter having come before this committee, the Council were committed.

With regard to s. 34 (2), some restriction must be placed on the literal meaning of the wide words in the section. The agreement really takes the place of an interim development order. Further the provision in the agreement giving a power to vary it takes it outside s. 34 altogether. (2)

Cur. adv. vult.

1938. July 28. LUXMOORE J. The Barnes Borough Council (hereinafter referred to as "the Council") is a local authority for the purposes of the Housing and Town Planning Acts, 1909 to 1922, the Town Planning Act, 1925, and the Town and Country Planning Act, 1932. The Council has entered into two agreements with Ranelagh Club, Ld. (hereinafter called "the club"), with regard to the future development of property belonging to the club and situate within the borough of Barnes (hereinafter called "the borough"). The area of this property, which has sometimes been referred to as "Barn Elms Park," is approximately one hundred and six acres and a half. The first of these agreements is dated August 1, 1935, and the second, which is expressed to be supplemental to the first, is dated January 24, 1936.

(1) See note (2) ante, p. 117. (2) See note (1) ante, p. 111.

This action was instituted on February 2, 1938, against the mayor, aldermen and burgesses of the borough by His Majesty's Attorney-General at the relation of a ratepayer of the borough, claiming that each of the two agreements is ultra vires the Council, and is therefore unenforceable and void. The grounds on which this claim is put forward are three. First it is said that the agreements resulted from the delegation by the Council of powers conferred on it by the Town and Country Planning Act, 1932 (hereinafter called "the Act of 1932"), to a joint committee which, it is alleged, was constituted by the Council under the power conferred on it by s. 48 of the Act of 1932, but without regard to and in contravention of the provisions of that section. Secondly it is said that the agreements, which purport to have been entered into by the Council in exercise of the powers conferred on it by s. 34 of the Act of 1932 (1), are not in fact authorized by that section, because neither agreement restricts the planning, development or use of the land in question in the manner contemplated according to the true construction of the section but is in fact permissive; because the club is, by reason of the agreements, in a position to plan, develop and use its land in a manner more favourable to the club than is provided in the draft town planning scheme proposed to be adopted by the Council and without making application for an interim development order, as required by the Act if the club should desire to plan, develop or use its land before any town planning scheme should come into operation. Thirdly, it is said that the agreement of August 1, 1935, contains provisions which could not have been incorporated in a town planning scheme under the Act of 1932 and is therefore unauthorized under the provisions of s. 34. (1)

The writ and subsequent proceedings were amended by the joinder of the club as a party defendant pursuant to an order dated February 21, 1938. No oral evidence was adduced at the hearing, there being no dispute of fact. The questions which arise for decision fall to be decided upon a consideration of the relevant documents, the facts thereby disclosed, and the relevant sections of the Act of 1932.

(1) See note (1) ante, p. 111.

[His Lordship stated the facts substantially as set out above.]

It is not necessary to refer to the actual terms of the agreement in considering the first point—namely, whether the execution of the agreement resulted from an improper delegation by the Council of its powers under the Act of 1932 to a committee purporting to be constituted under s. 48 of that Act but not in fact constituted in accordance with the requirements of that section.

Sect. 48 provides that: "(1.) A local authority . . . . may, "subject to the provisions of this section, appoint a committee "for any of the purposes of this Act, which, in the opinion "of the authority, would be better regulated and managed by "means of a committee, and may delegate to the committee, "with or without restrictions or conditions as they think "fit, any of their powers under this Act except the power of "levying a rate or borrowing money, ..." and: "(2.) A "committee appointed under this section shall consist of such "number of persons as the appointing authority think fit, "but at least three-fourths of the members of the committee "shall be members of the appointing authority."

The resolution relied on by the plaintiffs as constituting the committee under s. 48 is that dated May 20, 1935, to which I have already referred. In terms it is a resolution that: "The town planning scheme clauses sub-committee be "authorized to continue their negotiations with the club and "report to the town planning committee further in due "course." Before this date it is not suggested that the Council had purported to appoint any committee under the said section, nor has my attention been called to any subsequent resolution of the Council purporting to make any such appointment. I am at a loss to understand how the resolution of May 20, 1935, can be construed as constituting a committee either under s. 48 or at all, for it does not purport to make any appointment. Even if this difficulty could be surmounted, I find it impossible to read the resolution as a delegation by the Council of any of its powers under the Act of 1932. The agreement of August 1, 1935, was submitted to and approved by the Council, and the seal of the Council was affixed to it by the mayor by the authority of a resolution of the Council. It was by virtue of this resolution alone that the agreement was entered into and its execution was not in any sense the act of any committee. It is true that the Council delegated to the town planning scheme clauses sub-committee the final settlement of the three matters referred to in the resolution of the Council of July 31, 1935; but no question is raised with regard to the propriety of this delegation nor could such question properly be raised with regard thereto, for the Council were authorized to make such a delegation by s. 85 of the Local Government Act, 1933. (1)

It was suggested in argument that, because the proposal that the planning, development and user of the land belonging to the club should be the subject-matter of an agreement between the Council and the club under s. 34 (2) was first suggested by the town planning scheme clauses sub-committee and the representatives of the club and a draft of such agreement was prepared and its terms provisionally agreed before the draft was submitted to the Council, there must have been some delegation by the Council of its powers. It is difficult to appreciate any solid foundation for this argument. A consideration of the relevant resolutions leaves no doubt in my mind that no committee was ever appointed by the Council and further that no power to enter into any agreement under s. 34 (2) was ever delegated by the Council to any committee or other body. The decision to enter into the agreement in question was plainly the decision of the Council. The fact that the Council gave its town planning scheme clauses sub-committee power to agree the precise terms with regard to the three subsidiary matters already mentioned has no material bearing on this point. For these reasons I have no hesitation in holding that the first ground on which the validity of the agreement of August 1, 1935, is challenged fails.

The remaining questions require a consideration of s. 34 of the Act of 1932 and of the terms of the agreement itself. Sect. 34 provides: "(1.) Where any person is willing to

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(1) See note (2) ante, p. 119. (2) See note (1) ante, p. 111.

LUXMOORE J.
1938
ATTORNEY-GENERAL
v.
BARNES CORPORATION AND RANELAGH CLUB, LD.

"agree with any such authority as is mentioned in sub-"section (2.) of this section" (the Council in the present case is such an authority) "that his land, or any part thereof, "shall, so far as his interest in the land enables him to bind it, "be made subject, either permanently or for a specified "period, to conditions restricting the planning, development, "or use thereof in any manner in which those matters might "be dealt with by or under a scheme" (under the Act), "the "authority may, if they think fit, enter into an agreement "with him to that effect, and shall have power to enforce "the agreement against persons deriving title under him in "the like manner and to the like extent as if the authority "were possessed of, or interested in, adjacent land and as if "the agreement had been entered into for the benefit of "that adjacent land." Prima facie the words of the section are wide enough to authorize the Council to agree with any person (which description includes a corporate body like the club) who is ready to restrict his right to plan or to develop his property or to restrict its future use in any manner which might be provided for by or under a scheme under the Act, without the adoption of any scheme or the necessity for invoking the powers of the Act with regard to the making of a town planning scheme. If this be the true construction of the section, then, subject to a consideration of the terms of the agreement of August 1, 1935, it would appear that the Council was fully justified in entering into the agreement. The agreement, if considered apart from the provisions of the draft scheme approved by the Council, is obviously one which restricts the club in the future planning, development and use of its property. It is said however that on its true construction the section only relates to cases where the land to be dealt with is already included in a provisional town planning scheme and the owner of such land is willing to enter into restrictions in addition to those included in the provisional scheme. Sir Stafford Cripps' main argument in support of the view that the section ought not to be construed in the natural sense of the words used was that an authority might, by entering into an eleventh-hour agreement with an owner of land proposed to be included in a town planning scheme, prevent other persons interested in and affected by such a proposal from objecting to the terms of the agreement. He also argued that having regard to the provisions of the proposed town planning scheme, the agreement of August 1, 1935, was not in fact a restrictive agreement, but was entered into for the purpose of enabling the club to develop its land without the necessity of obtaining any interim development order, and from this point of view the agreement instead of being restrictive was permissive.

It is plain from a consideration of the Town Planning Acts that until a town planning scheme is made, that is, until the final approval of the Minister of Health has been obtained and the scheme has been submitted to Parliament, all land proposed to be included in a proposed town planning scheme is free from restriction, and an owner of land, proposed to be included in a proposed town planning scheme, is free to do what he as owner wishes in relation to the planning, development and use of his land, and no one can stop him from so doing. It is true that an owner who, after the date when it is proposed to prepare a town planning scheme affecting his land, builds upon it in any manner not in accordance with the scheme ultimately made can be compelled, when the scheme has become binding, either to pull down any buildings so erected or to make them conform to the requirements of that scheme ; but this circumstance does not constitute any restriction on the owner's rights while the proposed scheme is in the making and before it has become binding. If authority is needed for this view it is to be found in *In re Forsey and Hollebone's Contract* (1) and *Markham* v. *Derby Corporation*. (2)

Further it is to be observed that until a town planning scheme becomes binding, its actual terms are in a state of fluidity and are subject to consideration and alteration over what may be a long period of time. For this reason it seems difficult to compare the terms of a proposed town planning scheme with the terms of an actual agreement with a view

(1) [1927] 2 Ch. 379.

(2) [1935] Ch. 320.

to ascertaining whether the restrictions imposed by the latter are greater or less than those which may ultimately be imposed by a town planning scheme when made.

It seems to me to be plain that power to enter into an agreement which is to become binding immediately on an owner of land entering into it, and to be enforceable against him and his successors in title without the necessity of invoking the procedure necessary to make a binding town planning scheme is a beneficial power so far as the authority desirous of entering into such an agreement is concerned, and I am unable to appreciate the argument that the Legislature cannot have intended to confer such a power on an authority because the authority might in some circumstances use the power improperly for the purpose of conferring more favourable terms on a particular owner or particular owners than on another owner or other owners. It is not suggested that the Council in the present case has acted with any impropriety; but, if such a case should arise, the Courts would have ample power to prevent the perpetration of any such impropriety.

I have been unable to find anything either in the scheme or the Act of 1932 or in any of its provisions, which can legitimately be used to cut down the generality of the words of s. 34 or to restrict their meaning in the manner suggested on behalf of the plaintiff, and I therefore hold that upon the true construction of the section the Council, as an authority under the Act, has and had at all material times power to enter into an agreement with the club restricting the future planning, development or use of its land, provided that such restrictions are such as might be dealt with by or under a scheme under the Act of 1932. The second ground relied on by the plaintiff in support of his plea that the agreement of August 1, 1935, is ultra vires the Council and void and unenforceable, in my opinion also fails.

It remains to consider the last ground relied upon by the plaintiff—namely, that the agreement of August 1, 1935, contains provisions which could not have been included in a scheme under the Act of 1932. The agreement of August 1, 1935, provides, by clause 2, that the club, in consideration of the covenants on the part of the Council thereafter contained, agrees with the Council: (i.) that the estate (that is to say, the one hundred and six acres and a half of land belonging to the club situate within the borough of Barnes) shall, subject to the provisions of clause 4, be permanently subject to the conditions restricting the planning, development and use thereof contained in sub-clauses (ii.) to (x.) inclusive which are set out in clause 2 of the agreement. A perusal of these sub-clauses can I think leave no doubt in the mind of the reader that the provisions contained in them are in substance and in fact real restrictions on the future planning and development of the land, the subject-matter of the agreement.

It was argued by Sir Stafford Cripps on behalf of the plaintiff, although there is no plea to that effect in the pleadings, that the agreement contained certain provisions which could not properly be included in a town planning scheme made under the Act of 1932. The provisions on which he relies are those which provide for the reference to arbitration of disputes which may arise between the Council and the club with regard to matters arising in respect of (*a*) the general lay-out plan of the estate, other than a portion of it referred to as the "central area," being the plan to be prepared by the club as provided in sub-clause (ii.) (*a*) of clause 2; (*b*) the general lay-out plan of the central area to be prepared by the club as provided by sub-clause (vi.) (*g*) of clause 2; and (*c*) the variation in or the extension of the terms of the agreement in the event of either the Council or the club requesting such variation or extension to meet unforeseen circumstances or any alteration in the conditions from time to time prevailing: see clause 4 (*a*) of the agreement. The provisions with regard to arbitration are to be found in clause 4 (*b*). This clause provides that all such disputes as I have mentioned are to be referred to the decision of the Minister of Health for the time being or of a person nominated by him, but the parties may agree to submit any dispute to a tribunal to be constituted in the manner provided by Part I. of the Fourth Schedule to the Model Town and Country Planning Clauses, issued by the Minister of Health, dated January, 1935; or, if the Minister of Health refuses to act or nominate any such person as aforesaid, then the matters in dispute are to be submitted to such tribunal. Quite apart from any question under the Act of 1932, the general lay-out plans must necessarily conform with the provisions of the agreement with regard to planning, development and user, and the reference to arbitration is nothing more than machinery for obtaining a plan in accordance with the agreement, and cannot in my opinion be open to objection. In the same way the provisions with regard to the variation or extension of the agreement to meet unforeseen or altered circumstances, appear to me to be unobjectionable when it is remembered that s. 34 provides that any agreement entered into under it may be permanent or for a specified period, and that s. 40 of the Act provides that disputes arising under a town planning scheme may be referred either to the Minister or to an arbitrator to be agreed by the parties or appointed by the Minister. In my judgment, all of the provisions of which complaint is made can properly be included in a town planning scheme. For the reasons I have stated I hold that the agreement of August 1, 1935, is not ultra vires the Council but is valid and binding on the parties to it.

It will be observed that I have not referred to the terms of the supplemental agreement of January 24, 1936. The reason why I have not done so is that counsel for the parties agreed that the supplemental agreement must stand or fall with the agreement of August 1, 1935. No reference was made at the hearing to it, nor was my attention called to any of its terms. I understand that its only purpose is to effect an extension of certain time limits fixed by the agreement of August 1, 1935.

In the result the action fails with regard to both agreements and must be dismissed.

Solicitors: *Joynson-Hicks & Co.*; *Arthur C. Fox*; *Elvy Robb & Co.*

A. R. LL.-T.

In re WHITE.

SKINNER *v.* ATTORNEY-GENERAL.

[1937. W. 1478.]

C. A.
1938
April 7, 8;
May 10.

Revenue—Estate duty—Testator domiciled in Northern Ireland—Annuity bequeathed to wife and charged on residue—Testator's estate partly in Northern Ireland—Estate duty paid to Ministry of Finance in Northern Ireland—Part of proceeds of testator's estate invested in English investments—Widow's interest in English investments ceasing on her death—Estate duty payable on English investments on her death—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-ss.* 1, *para.* (*b*), 2; *ss.* 5, 7, *sub-s.* 10; *s.* 22, *sub-s.* 1, *para.* (*e*)—*Finance Act,* 1914 (4 & 5 *Geo.* 5, *c.* 10), *s.* 14—*Meaning of "estate duty."—Finance Act,* 1936 (26 *Geo.* 5 & 1 *Edw.* 8, *c.* 34), *ss.* 24, 25—*Government of Ireland Act,* 1920 (10 & 11 *Geo.* 5, *c.* 67), *ss.* 28, 61—*Government of Ireland* (*Adaptation of the Taxing Acts*) *Order,* 1922.

A testator died on July 27, 1923, domiciled in Northern Ireland, having bequeathed an annuity to his wife during her life charged on all his residuary estate. The testator's estate at his death consisted of real and personal estate in Northern Ireland, personal estate in England (which by reason of its small value was exempt from English estate duty) and real and personal estate in the United States of America.

The testator's executors paid estate duty to the Ministry of Finance in Northern Ireland on the entirety of the testator's personal estate and upon his real estate in Northern Ireland, such duty being leviable by the effect of the Government of Ireland Act, 1920, and the Government of Ireland (Adaptation of the Taxing Acts) Order, 1922 (S. R. & O., 1922, No. 8).

The widow died on February 5, 1936, domiciled in Northern Ireland, and at her death the testator's estate consisted of English investments, an investment in Northern Ireland and real and personal estate in the United States of America. No part of the estate had been appropriated to meet the annuity, and the only outstanding liabilities were a claim for estate duty by the authorities of the United States and legal expenses incurred in the United States in connection with the administration there:—

Held, (1.) that the interest of the widow in the testator's estate was not merely in the entirety of the estate considered as a unit to be administered, but in each part of it;

And (2.) that the widow had an interest ceasing on her death in the English investments within the meaning of s. 2, sub-s. 1, para. (*b*), of the Finance Act, 1894: *Attorney-General* v. *Watson* [1917] 2 K. B. 427 followed; *Attorney-General* v. *Johnson* [1907] 2 K. B. 885 considered.

Reported by Sir Lancelot Elphinstone, Barrister-at-law, from the notes of the late W. Ivimey Cook.

C. A.
1938
WHITE, *In re.*
SKINNER *v.* ATTORNEY-GENERAL.

Under s. 5, sub-s. 2, of the Finance Act, 1894, as amended by s. 14 of the Finance Act, 1914, the English investments would have been exempt from English estate duty on the death of the widow if estate duty had been paid in respect of the same property on the death of the testator.

Held, by Clauson J. and the Court of Appeal, that "estate duty" in s. 5, sub-s. 2, does not include estate duty leviable in Northern Ireland under the Government of Ireland Act, 1920, and that the English investments were not exempt from English estate duty on the death of the widow.

APPEAL from a judgment of Clauson J. (1)

The following statement of the facts is taken substantially from the judgment of the Court delivered by the MASTER OF THE ROLLS.

The testator, John Campbell White, died on July 27, 1923, domiciled in Northern Ireland. By his will dated December 2, 1920, he appointed his two nephews the plaintiffs, Robert Skinner and Edward John Skinner, the plaintiff, George Herbert Wheeler and William John McMillan (who died on May 1, 1933) to be his executors. He bequeathed to his wife, Edith Evelyn White, an annuity of 5000*l.* (increased by a codicil to 7500*l.*) free of income tax and sur-tax, and to his housekeeper an annuity of 100*l.* (increased by the codicil to 200*l.*) free of income tax; and after bequeathing certain pecuniary legacies he devised and bequeathed all his property, real and personal, not thereby otherwise disposed of, to his two nephews in equal shares subject to and charged with the payment of his debts, funeral and testamentary expenses and all Crown duties and the legacies and annuities bequeathed. Neither the will nor the codicil declared any trusts and there was no appointment of trustees.

The will and codicil were proved in Northern Ireland by the four executors on December 3, 1923, and the grant of probate was resealed in England on November 2, 1933.

The estate of the testator at the date of his death consisted of real and personal estate in Northern Ireland, personal estate in the Irish Free State, personal estate in England (valued at 66*l.* 8*s.* 1*d.*) and real and personal estate in the United States of America. The executors paid estate duty to the Ministry of Finance in Northern Ireland on the entirety of the testator's personal estate and upon his real estate in Northern Ireland. No estate duty was paid in England owing to the smallness of the value of the English property.

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(1) [1938] Ch. 366.

The real and personal estate of the testator in the United States of America consisted of the residuary real and personal estate of his brother, James Brice White, who at his death was domiciled in that country. By his will James Brice White appointed the testator and his two nephews to be trustees thereof and, after making a specific devise of certain real estate and bequeathing certain pecuniary legacies and annuities and directing that in certain events certain capital sums should be raised, he devised and bequeathed his residuary estate in trust for the testator absolutely.

At the death of the testator the residuary real and personal estate of James Brice White had been ascertained and determined, but no provision had been made for any of the annuities or capital sums bequeathed by his will.

After the death of the testator the two nephews as surviving trustees of James Brice White's will, being satisfied that the entirety of his residuary estate was not required for the purpose of providing for the annuities and capital sums, released portions of the residuary real estate from any liability to provide for them. The portions so released were sold from time to time during the lifetime of the testator's widow and the proceeds were handed over to the executors of the will of the testator. The remaining portions of the residuary real and personal estate of James Brice White are still held by the two nephews as the surviving trustees of his will in trust for the executors of the will of the testator, subject to provisions being made thereout for the annuities and capital sums bequeathed by the will of James Brice White. These remaining portions are still locally situate in the United States of America. With the exception of these portions of James Brice White's estate the whole of the estate of the testator (including the portions of the residuary real and personal estate of James Brice White which had been released as above stated) was sold during the lifetime of the testator's widow. With the

C. A.
1938
WHITE,
In re.
SKINNER
v.
ATTORNEY-GENERAL.

exception of certain liabilities in the United States of America to be presently mentioned, all the debts, funeral and testamentary expenses of the testator and all duties payable on his death and all the legacies bequeathed by him had been paid and the balance (except a sum of 7000*l.* invested in Belfast Corporation Stock) amounting to the sum of 231,713*l.* had been, and at the death of the widow still was, invested in English securities. Of this sum of 231,713*l.* the sums of 46,597*l.* and 153,712*l.* respectively represented proceeds of sale of real and personal estate in the United States of America.

On the death of the testator no claim was made by the United States authorities for estate duty upon his interest in the residuary real and personal estate of James Brice White. But in the year 1934 the executors of the testator were called upon to pay such duty. At the death of the testator's widow this claim had not been settled and there were also certain legal expenses unpaid which had been incurred in the United States of America in connection with the administration in that country. The claim for duty was finally settled at $113,489.90, and this sum was paid on September 23, 1936. The legal expenses amounting to $10,506 have also been paid.

By a deed dated December 17, 1934, George Herbert Wheeler purported to retire from the trusts of the will and codicil of the testator. The deed contained a vesting declaration and provision for transferring to the two nephews certain investments mentioned in the schedule. But as there were no trusts declared and no trustees appointed by the will and codicil of the testator, this document was not effective for the purpose stated in it, and did not discharge George Herbert Wheeler from the office of executor.

The testator's widow died on February 6, 1936. The position with regard to the testator's estate at the date of her death was as follows: With the exception of the portions of the real and personal estate of James Brice White retained in the United States of America and charged with the annuities and capital sums bequeathed by his will and the 7000*l.* Belfast Corporation Stock, the entire estate consisted of English investments. The only outstanding liabilities of the testator's estate were the claim of the United States authorities for estate duty for which the testator's executors were personally liable and the legal expenses already mentioned. Subject to these liabilities the estate was still retained by the executors for the purpose of securing the widow's annuity and the annuity of the testator's housekeeper, and the executors had not set aside any part of the estate to meet these annuities.

On May 1, 1936, the surviving executor took out an originating summons to determine whether, on the death of the widow, estate duty became payable in England on any of the English investments. The summons was heard by Clauson J. who held, (1) that the estate duty became payable in respect of the English investments, such duty to be assessed in accordance with the provisions of s. 7, sub-s. 7, of the Finance Act, 1894, in respect of so much of the annuity as was properly apportionable to the said investments.

The executors appealed.

Cyril Radcliffe K.C., *J. M. Whitaker*, and *F. Renfield* for the appellants. The first question is whether, having regard to the nature of the interest of the annuitant in an estate which even at her death had not been fully administered, the cesser of the annuity caused a notional passing of some part of the estate under s. 2 of the Finance Act, 1894. An annuity bequeathed by will is a legacy payable at intervals during the life of the annuitant and is satisfied out of the general estate of the testator, unless some special part of the estate is indicated. No part of it is payable until the debts and liabilities of the testator are paid. The position of the executors in regard to the testator's assets is that they have possession of them during the period of administration, but with the duty to use them from time to time as the testator has directed or, in the absence of any directions, as the law provides. But no property vests in any beneficiary so long as the assets are being administered. Further an annuitant never can have a proprietary interest in any part of the estate unless the executors are given power to appropriate a fund to answer it and do so.

(1) [1938] Ch. 366.

C. A.
1938
WHITE,
In re.
SKINNER
v.
ATTORNEY-GENERAL.

Apart from the particular case, the annuitant has no interest in any particular part of the general estate. The relevance of this for the purpose of duty only arises when part only of the estate is invested in this country. Estate duty is imposed by ss. 1 and 2 of the Finance Act, 1894, and s. 7, sub-s. 7, deals with the value of the property passing on the death of an annuitant—namely, a share of the estate sufficient by its income to pay the annuitant. The appellants' case is that the widow's annuity in this case was payable out of property in Northern Ireland and in so far as that is so s. 2, sub-s. 2, of the Act of 1894 is applicable. That sub-section provides that "property passing on the death of the deceased when "situate out of the United Kingdom shall be included only, "if, under the law in force before the passing of the Act, "legacy or succession duty is payable in respect thereof." That exception now applies to property in Northern Ireland. It is true that on the death of the widow part of the estate was invested in England, but, as the estate had not been fully administered, her only interest was an interest in the entirety, consisting of the right to have the whole estate administered. For this purpose she could only sue in the proper forum, which is Northern Ireland. It cannot therefore be said that any interest in property in Great Britain passed on her death; the authorities showing that the annuitant has no direct interest in the estate until it has been fully administered. *In the Goods of William Ewing* (1) and *Lord Sudeley* v. *Attorney-General.* (2)

[Sir WILFRID GREENE M.R. Is the proper forum determined by the domicil of the testator or the residence of the executors ?]

A chose in action is normally located where the debtors are situate, but where, as here, there are three debtors, two of whom are in this country and one abroad, the question what is the forum to administer the estate is settled by the domicil of the testator. That was the test applied in *In re Smyth* (3) and *Attorney-General* v. *Johnson* (4).

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(1) (1881) 6 P. D. 19.

(2) [1896] 1 Q. B. 354; [1897] A. C. 11.

(3) [1898] 1 Ch. 89.

(4) [1907] 2 K. B. 885.

Authorities showing that a beneficiary under a will has no direct interest in the estate while it is being administered are *Favorke* v. *Steinkopff* (1) and *Attorney-General* v. *Watson* (2). It follows that no property can be deemed to have passed on the widow's death under s. 2, sub-s. 1, para. (*b*), as being "property in which the deceased . . . had an interest ceasing "on the death of the deceased."

But if the appellants are wrong on this point, the further question arises whether the exemption from death duty created by s. 5, sub-s. 2, of the Finance Act, 1894, as amended by the Finance Act, 1914, s. 14, applies here so that, in so far as estate duty was paid on the death of the testator, it is not payable again on the cesser of the widow's annuity. That would clearly be so except as to the real estate in America which was not chargeable with duty on the testator's death, were it not that the estate duty paid on the testator's death was paid in Northern Ireland and not in England. That, however, makes no difference, for the estate duty paid in Northern Ireland was paid under the Finance Act, 1894. This is made clear by the Government of Ireland Act, 1920, and the Government of Ireland (Adaptation of the Taxing Acts) Order, 1922 (Statutory Rules and Orders, 1922, No. 8). Sect. 20 of the Act of 1920 established a separate Exchequer and Consolidated Fund for Northern Ireland and by s. 21 the proceeds of death duties were to be paid to the consolidated fund. That section merely conferred the ownership of death duties in Northern Ireland on the Government of that country. Clauson J. held on this ground that exemption above referred to did not apply here. But this was incorrect because the duty in Northern Ireland was paid under the same Act. Thus by s. 61 of the Act of 1920 all existing taxes in Ireland were continued, but with the modifications necessary to adapt them to this Act which are contained in the Order of 1922, Part III. Clause 13 deals with death duties before the appointed day, and clause 14 provides that the death duties Acts (including the Finance Act, 1894, Part I., as amended) are to apply on and after the appointed day subject to adaptations, none of which impose any new duty but merely cause death duty collected in Northern Ireland to belong to its Government. It follows that, the testator's estate having borne estate duty under the Act of 1894, at his death, the exemption applies. The Finance Act, 1936, s. 25, expressly made this exemption applicable for the future when estate duty is paid in Northern Ireland and it is said therefore that this cannot have been the position previously. The section really only puts the matter beyond doubt for the future and being a positive enactment it cannot be used to construe the earlier Acts.

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(1) [1922] 1 Ch. 174.

(2) [1917] 2 K. B. 427.

J. H. Stamp for the Attorney-General. The suggestion that estate duty in the two countries is a single duty, governed by the Finance Act, 1894, causes insuperable difficulties. Thus s. 4 of that Act fixes the rate of duty by reference to the aggregate value of the property passing on the deceased's death. If the duties in the two countries were a single duty, it would be necessary to aggregate property chargeable to estate duty in both countries so as to tax in both countries at a higher rate. Further, as estate duty is chargeable in both countries, double duty would be charged if it is to be regarded as a single duty. Clearly then the two estate duties must be regarded as separate duties to be given effect to independently.

Cur. adv. vult.

1938. May 10. SIR WILFRID GREENE M.R. read the judgment of the Court, consisting of the MASTER OF THE ROLLS, SCOTT and MACKINNON L.JJ. [after stating the facts, the judgment proceeded :] In these circumstances the Commissioners of Inland Revenue in England claimed that estate duty became payable in England upon the death of the widow under s. 2, sub-s. 1 (*b*), of the Finance Act, 1894, in respect of the residuary estate of the testator in so far as it was then represented by English securities. To this claim the executors, the present appellants, put forward two answers. In the first place they said that the widow had no interest in the specific securities in England ; that the only right to which she was entitled at her death was a right to have the residuary estate

C. A.
1938
WHITE,
In re.
SKINNER
v.
ATTORNEY-GENERAL.

duly administered, and that the forum of administration being Northern Ireland her right was locally situated there. Alternatively they said that, inasmuch as the estate (other than the real estate in the United States of America) had already borne estate duty in Northern Ireland, they were entitled to the exemption conferred by s. 5 of the Finance Act, 1894, in respect of the English securities save in so far as they represented the proceeds of sale of the real estate in the United States. Clauson J., as he then was, decided against the appellants on both points.

The first of these arguments raises a question of general application and does not depend in any way upon the statutory provisions in force relating to Northern Ireland. By s. 2 of the Finance Act, 1894, it is provided as follows: "(1.) Property "passing on the death of the deceased shall be deemed to include "the property following, that is to say:—. . . . (*b*) Property "in which the deceased . . . . had an interest ceasing on the "death of the deceased, to the extent to which a benefit accrues "or arises by the cesser of such interest . . . . (2.) Property "passing on the death of the deceased when situate out of the "United Kingdom shall be included only, if, under the law "in force before the passing of this Act, legacy or succession "duty is payable in respect thereof . . . ."

If at the death of the widow in the present case no part of the testator's estate had consisted of property in Great Britain, estate duty would not have been chargeable on the death of the widow by reason of the provisions of sub-s. 2. If, on the other hand, the entire estate of the testator had consisted of property in Great Britain, we do not think that it could have been argued that duty was not payable. It has been held, and in our opinion rightly held, that an annuitant has an interest in a testator's residuary estate within the meaning of the section: *Attorney-General* v. *Watson*. (1) If, therefore, the entire residuary estate is situated in the United Kingdom, the exemption granted by sub-s. 2 does not come into operation. It is said, however, that this is so, not because the annuitant has an interest in any specific piece of property forming part

(1) [1917] 2 K. B. 427.

of the residuary estate, but because, his right being a right to have the entire estate properly administered, he may for that reason be said to have an interest in the entire estate. Proceeding from this the argument goes on to say that, where part only of the estate is situated in Great Britain, it is not possible to say that the annuitant had an interest in that part, that his interest is an interest in the entirety consisting of a right to have that entirety administered in the proper forum which (in the present case) would be Northern Ireland.

In our opinion this argument is based on too narrow a construction of the word "interest" in the section and we cannot accept it. The word "interest" like other words in the Act has a popular rather than a technical meaning. Considering the language of the section in this light and apart from authority, we should have thought that an annuitant has an interest for the purposes of the section not merely in the entirety of the estate considered as a unit to be administered, but in each part of it. This view is, we think, confirmed by the words "to the extent to which a benefit accrues or arises "by the cesser of such interest." For the residuary legatees are benefited by the death of the annuitant in respect of each part of the estate which is thereby freed from the burden which lay upon it during the annuitant's life. The argument is really divorced from reality, and, if sound, would lead to curious results as appears from the following case suggested by Mr. Stamp in his argument for the respondent. A testator domiciled in Canada bequeaths his residuary estate subject to and charged with an annuity. If at the death of the annuitant the whole estate is situated in Great Britain estate duty will be payable here. If the whole estate is situated in Northern Ireland estate duty will be payable there. But if part is situated in Great Britain and the remainder in Northern Ireland, no estate duty will be payable in either country.

Mr. Radcliffe for the appellants relied on a line of authorities in which *In the Goods of William Ewing* (1) and *Lord Sudeley* v. *Attorney-General* (2) are typical and familiar examples. But in our opinion these authorities have no application to the present question. They were concerned with the local situation to be attributed to property for purposes of probate or probate duty, and the questions which arose were two (*a*) what was the property which the deceased owned at his death ? (*b*) what for the purposes of a grant of probate was its local situation ? The property in question being merely a right to have another estate duly administered, it was held that the local situation of the property was in the country of the forum of administration of that other estate. These authorities do not, in our opinion, throw any real light upon the construction of the language with which we are concerned. The problem here is not to discover the locality to be attributed to a right, either as a general proposition or for the purposes of probate. The question which we have to answer is, had the deceased annuitant an interest within the meaning of s. 2 of the Finance Act, 1894, in the property situated in the United Kingdom ? This question we answer in the affirmative, and in doing so we do not, of course, assert that for the purposes of the general law an annuitant has a right to or an interest in any particular property forming part of the estate.

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(1) 6 P. D. 19.

(2) [1896] 1 Q. B. 354; [1897] A. C. 11.

Another way of reaching the same result would be to say that the effect of reading sub-s. 1 (*b*) and sub-s. 2 together is that the annuitant had for the purposes of the section an interest in the entirety of the property save in so far as that property was situate out of the United Kingdom.

The only authority which has caused us any difficulty is *Attorney-General* v. *Johnson.* (1) The grounds of the decision are not clearly expressed and the report is difficult to follow in that arguments of counsel relevant to succession duty are inextricably mixed up with arguments relevant to estate duty. We do not find anything in this case to lead us to doubt the correctness of our view. In our opinion the decision turned upon the fact that there was a trust for sale which effected a notional conversion of the real estate in Assam, so that the property fell to be treated as personal estate in the hands of the trustees who were resident here.

(1) [1907] 2 K. B. 885.

The second argument depends upon the true construction and effect of the Government of Ireland Act, 1920, and an Order in Council made thereunder. By that Act a separate Parliament and executive government were set up for Northern Ireland. By s. 20 an Exchequer and Consolidated Fund of Northern Ireland were established separate from those of the United Kingdom, and by s. 21 the proceeds of all taxes which the Parliament has power to impose (including death duties) are to be paid into this Consolidated Fund. Sect. 61 provides that "All existing laws . . . . in Ireland . . . . and all "existing taxes in Ireland, shall, except as otherwise provided "by this Act, continue as if this Act had not passed, but with "the modifications necessary for adapting them to this Act . . . ." The adaptations thus contemplated were made by the Government of Ireland (Adaptation of the Taxing Acts) Order, 1922. (1) By Part I., cl. 2, and Part III., cl. 12, the Death Duties Acts including Part I. of the Finance Act, 1894, and the Acts amending it are to "have effect subject to the adaptations and modi-"fications set out in" Part III. By cl. 14 of Part III. the Death Duties Acts are to apply to deaths on or after the appointed day subject to certain adaptations including the substitution of the Minister of Finance for Northern Ireland for the Commissioners of Inland Revenue and the substitution of "Northern Ireland" for "the United Kingdom" in certain sections of the Finance Act, 1894, notably sub-s. 2 of s. 2.

The appellants claim to be entitled to the benefit of sub-s. 2 of s. 5 of the Finance Act, 1894, upon the ground that on the death of the testator estate duty had been paid in Northern Ireland upon the entirety of his estate other than the real property in the United States of America. They rely on the definition of "estate duty" in s. 22, sub-s. 1 (*e*), as "estate duty "under this Act" and say that the estate duty so paid in Northern Ireland was estate duty under the Finance Act, 1894, which continued in force in Northern Ireland after, as it had done before, the appointed day subject only to the adaptations to which we have referred.

This argument appears at first sight to be attractive, but we

(1) S. R. & O. 1922, No. 80, p. 701.

are unable to accept it. In our opinion the effect of the Government of Ireland Act, 1920, and the Order in Council made thereunder was to split estate duty into two duties, the one collected by the Northern Irish Executive on behalf of the Crown in right of Northern Ireland, the other collected by the United Kingdom Executive on behalf of the Crown in right of the United Kingdom. The proceeds of each tax is paid by the collecting authority into the appropriate exchequer and is applicable for the services of the country where it is collected. On the occasion of a death which gives rise to a claim for estate duty in both countries the property in respect of which the duties are leviable is not necessarily the same, although, as is contemplated by s. 28 of the Government of Ireland Act, the same property may be liable to duty in both countries. The fact that the duty is still levied under the same Act, as kept in force and adapted, does not, in our judgment, make the duties levied in the two countries one duty, and the Act including the definition clause must be construed in the light of the new situation brought about by the Government of Ireland Act and the Order in Council. That this must be the correct view is, we think, confirmed by a consideration of the difficulties which would arise if the construction put forward by the appellants were accepted. It is only necessary to refer to two of these difficulties. The provisions of s. 4 of the Finance Act, 1894, relating to aggregation would be quite unworkable if the estate duty were regarded as one duty. It is manifest that in a case where duty is payable in both countries on the same death the property to be aggregated for the purpose of the duty in the United Kingdom may be different from that to be aggregated for the purpose of the duty in Northern Ireland with a resulting difference in the rate. Yet this would not be possible if the appellant's contention were sound. A further obvious difficulty would arise under s. 7, sub-s. 10, which provides that estate duty shall not be more than once levied on the same death. We can find no means of reconciling the appellants' argument with this provision which, if that argument were right, would be in direct contradiction of the Government of Ireland Act and the Order in Council.

C. A.
1938
WHITE, *In re.*
SKINNER *v.* ATTORNEY-GENERAL.

In coming to our conclusion upon this part of the case we have not been influenced by the fact that s. 25 of the Finance Act, 1936, provided that in the case of death after the passing of that Act of the surviving party to a marriage the relief claimed by the appellants in this case is to be granted. It was said on behalf of the respondent that this section amounts to a declaration by the Legislature that under the pre-existing law the relief could not be claimed. We express no opinion upon this point. In the result the appeal is dismissed with costs.

Appeal dismissed.

Solicitors for appellants: *Russell & Arnholz.*
Solicitors for respondents: *Solicitor of Inland Revenue.*

L. H. E.

C. A.
1938
July 27.

In re A DEBTOR.

[No. 382 of 1938.]

Ex parte THE DEBTOR *v.* THE PETITIONING CREDITORS AND THE OFFICIAL RECEIVER.

Bankruptcy—Deed of assignment by debtor—Alleged act of bankruptcy—Implied assent of creditor to deed—Petition by that creditor—Receiving order—Invalidity of petition and receiving order—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 5, *sub-s.* 3.

At a full meeting of the creditors of a debtor held on April 4, 1938, it was proposed and seconded that the debtor be asked to execute a deed of assignment to two named persons as trustees for the benefit of his creditors. Thereupon the representative of certain creditors, being a minority of those present, moved an amendment to substitute a nominee of theirs for one of the proposed trustees, but as that amendment was not seconded it fell to the ground. The chairman put the substantive proposal to the meeting and a large number of those present voted for it; he next asked for those against it, but no hand was raised; and he accordingly declared the proposal carried without opposition. A proposal that a committee of inspection should be appointed was also carried without opposition. The deed of assignment was thereupon duly executed. At the close of the meeting the representative of the minority creditors asked the chairman to record his objection. On May 13, 1938, the minority creditors presented a petition for a receiving order against the debtor on the ground that by executing the deed he had committed an act of bankruptcy. The registrar in bankruptcy made a receiving order. On appeal:—

Held, by the Court of Appeal, that the petitioning creditors by their conduct had tacitly acquiesced in the making of the deed and become bound by it along with the other creditors, and that they could not, therefore, rely upon it as an act of bankruptcy; that the case was one in which, under the Bankruptcy Act, 1914, s. 5, sub-s. 3, the Court should be satisfied that for sufficient cause no receiving order ought to be made; and that the receiving order should be rescinded and the petition dismissed.

In re A Debtor [1936] Ch. 165 followed.

In re Stray. Ex parte Stray (1867) L. R. 2 Ch. 374, and *In re Brindley. Ex parte Taylor, Sons & Co.* [1906] 1 K. B. 377, principle applied.

APPEAL against a receiving order made by the registrar in bankruptcy on a creditors' petition.

The facts as stated in the minutes and affidavit hereinafter referred to were as follows :—

On March 29, 1938, a preliminary meeting of the creditors of the debtor was held, at which the chairman was a Mr. P. H. Goodwin, representing the firm of solicitors acting for the creditors there present, and a resolution was passed that the meeting be adjourned to a full meeting of creditors with the recommendation that the debtor be asked to execute a deed of assignment in favour of the said Mr. Goodwin and a Mr. F. Green as trustees on behalf of the creditors.

On April 4, 1938, the adjourned full meeting of creditors was duly held on notice, at which Mr. Goodwin, the chairman, mentioned the recommendation of the previous meeting as to a deed of assignment by the debtor to Messrs. Goodwin and Green as trustees. Thereupon a Mr. King, representing the firm of solicitors acting for certain creditors, who formed a minority of the creditors present and had not been present at the previous meeting, said that he was instructed by his clients to agree in principle to a deed of assignment, but that they felt that their own nominee should be appointed as trustee thereof jointly with Mr. Goodwin. It was then proposed and seconded that the debtor be asked to execute a deed of assignment in favour of Messrs. Goodwin and Green as joint trustees on behalf of the creditors. Mr. King for the minority creditors moved an amendment to substitute the name of a Mr. Fincham, their nominee, for that of Mr. Green as trustee, but as it was not seconded it fell to the ground. The chairman put the substantive proposal to the meeting and a large number of those present voted in favour of it. He next asked for those against it, but no hand was raised. He then declared that the proposal had been carried nemine contradicente. A proposal, moved by the chairman and seconded, that a committee of inspection consisting of three named persons should be appointed was also carried nemine contradicente. The deed was then executed by the debtor, the two trustees, and several creditors. The minutes of that meeting, recording the above-mentioned facts, were thereupon signed by the chairman. At the end of the meeting

Mr. King said to the chairman: "Of course, you will register "my objection, as I reserve all my clients' rights."

On May 13, 1938, the said minority creditors presented a petition to the High Court that a receiving order be made in respect of the estate of the debtor on the ground that the debtor within three months before the presentation of the petition had committed an act of bankruptcy, namely, that he did on April 4, 1938, execute the said deed of assignment of his property to trustees for the benefit of his creditors generally, which deed was registered under the Deeds of Arrangement Act, 1914 (4 & 5 Geo. 5, c. 47) on April 11, 1938. On June 10, 1938, an affidavit setting out the facts above stated was filed by Mr. Goodwin in opposition to the making of a receiving order.

The debts of the non-petitioning creditors amounted to upwards of 15,000*l.*, and the petitioning creditors claimed that their debts amounted to 3385*l.*

On June 14, 1938, Mr. Registrar Kean gave his decision. He held that there had been no acquiescence by the petitioning creditors in this particular deed of arrangement which appointed Messrs. Goodwin and Green to be trustees and not Messrs. Goodwin and Fincham as desired by those creditors, and that the deed could be used by these creditors as an act of bankruptcy. In his view an acquiescence only in an assignment to A did not debar a creditor from using an assignment to B as an act of bankruptcy. He accordingly made a receiving order against the debtor.

The debtor gave notice of appeal dated June 16, 1938, for an order that the receiving order might be rescinded and the petition dismissed.

W. P. Spens K.C. and *W. A. L. Raeburn* for the debtor, appellant.

The learned registrar, instead of making a receiving order, should have dismissed the petition. The basis of the petition and of the receiving order was that the debtor had executed a deed of assignment for the benefit of his creditors generally in the circumstances mentioned in the petition. The ground of appeal is that under the Bankruptcy Act, 1914, s. 5, sub-s. 3, the case is one in which the Court ought to dismiss the petition because it is satisfied that there is sufficient cause why no receiving order ought to be made. A deed of assignment may no doubt be relied upon as an act of bankruptcy by creditors who have opposed the making of it, or even by creditors who have not assented to it. It cannot, however, be relied upon as an act of bankruptcy by creditors who are parties to it. Nor can it be so relied upon by creditors who, though not actual parties to it, have become privy to it by tacitly acquiescing in the execution of it. In the present case the petitioning creditors, though they did not execute this deed of assignment, were present at the full meeting of creditors at which the proposal in favour of the deed was carried; when the proposal was under discussion they did not oppose it; and when they were given an opportunity of voting against it they abstained from doing so, with the result that it was carried without opposition. In these circumstances they must be taken to have acquiesced in the deed and to be estopped from relying upon it as an act of bankruptcy. The mere facts that their representative moved an amendment which was not seconded for the appointment of a nominee of their own as a trustee of the deed, and that at the conclusion of the meeting he asked the chairman to record their objection, do not amount to opposition to the deed on their part. It is not disputed that a creditor who has expressly or tacitly consented to such a deed may withdraw his consent at any time before the execution of the deed, but the petitioning creditors gave no indication of any withdrawal of their tacit consent before the execution of this deed. In the circumstances the petitioning creditors cannot impugn the deed and treat it as an act of bankruptcy.

The facts of this case bring it within the decision in *In re A Debtor* (1), to the effect that the acquiescence of the petitioning creditor brought him within s. 5, sub-s. 3, of the Act of 1914, and prevented him from treating the deed of assignment as an act of bankruptcy. Even before the passing of that Act the same principle was recognized and applied in *Ex parte Stray. In re Stray* (1), and *In re Brindley. Ex parte Taylor, Sons & Co.* (2) In the present case the Court ought to be satisfied that for sufficient cause no receiving order ought to be made.

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(1) [1936] Ch. 165.

W. N. Stable K.C. and *A. Melford Stevenson* for the petitioning creditors, respondents.

The decision of the registrar was right. The petitioning creditors were entitled to rely upon the deed of assignment as an act of bankruptcy by the debtor, and there is no "sufficient cause" within the meaning of the Bankruptcy Act, 1914, s. 5, sub-s. 3, why a receiving order should not be made. The only ground on which it can be suggested that the petitioning creditors are not entitled to rely upon a deed of assignment by a debtor as an act of bankruptcy is that they are in the circumstances estopped from doing so. A creditor may be estopped from relying upon the deed for that purpose where he has become a party to it, or where he has expressly approved it or where he has shewn by his conduct that he acquiesced in it, as in the cases of *Ex parte Stray* (1), and *In re Brindley.* (2) In the present case the petitioning creditors have done nothing to estop them for this purpose. They did not become parties to the deed, they never expressed approval of it in the form in which it was executed, and they did not show by their conduct that they acquiesced in it. The mere fact that they did not vote against it does not imply that they acquiesced in it. There is no evidence to show that their conduct misled any other creditor into thinking that they approved of the deed. So far from approving of or acquiescing in the deed they plainly, by their representative, expressed their disapproval of it. On their behalf he moved an amendment to substitute their nominee as a trustee of the deed in place of one of the proposed trustees; and at the conclusion of the meeting he asked the chairman to register their objection. In view of their having taken these objections, it cannot be said that by merely remaining present at the meeting and taking no further part in the proceedings they

(1) (1867) L. R. 2 Ch. 374.

(2) [1906] 1 K. B. 377.

were acquiescing in the deed. The fact that these objections were taken by or on behalf of the petitioning creditors distinguishes this case from the case of *In re A Debtor.* (1) If in that case it was held that a creditor who merely remains silent when the deed of assignment is under discussion is estopped from relying on the deed as an act of bankruptcy, then that case would be contrary to the principle of the two earlier decisions already referred to.

GREER L.J. This case seems to me to be entirely within the principle that was the ground of the decision of Clauson and Luxmoore JJ. in the case of *In re A Debtor* (1), which, I think, was rightly decided.

The matter is now determinable by statute. The Bankruptcy Act, 1914, s. 5, sub-s. 3, provides: "If the court "is not satisfied with the proof of the petitioning creditor's "debt, or of the act of bankruptcy, or of the service of the "petition, or is satisfied by the debtor that he is able to pay "his debts, or that for other sufficient cause no order ought "to be made, the court may dismiss the petition."

To my mind there was here ample ground upon which the registrar should have held himself to be satisfied for sufficient cause that a receiving order ought not to be made, and therefore that he ought to have dismissed the petition. The case of *In re A Debtor* (1) was cited to him, but he does not seem to have considered it in detail. The facts in that case were that the particular creditor who petitioned had not opposed a resolution that the debtor be asked to execute a deed of assignment, or a resolution that he should be a member of the committee of inspection to be appointed under the deed. He had in fact by his silence indicated that he did not oppose the resolution that he should be a member of the committee. He did not in fact ever become a member of the committee, and when he was asked to attend a meeting of the committee he said: " I am not assenting to the deed and I am not in "favour of a committee." It was only by reason of his silence when the proposition was made that he should be a member of the committee that he was held to be subject to the provisions of s. 5, sub-s. 3, of the Act to which I have referred.

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(1) [1936] Ch. 165.

We need not go back beyond the Statute; but if it were necessary to do so, it seems to me that the case of *Ex parte Stray. In re Stray* (1) supports the decision of the learned judges in *In re A Debtor.* (2)

If it be necessary to consider whether there was an estoppel, it is to be remembered that estoppel may arise by conduct as well as by deed. It may arise by refraining from doing some act whereby the persons concerned are misled, and refraining from opposing a resolution that there should be a deed of assignment or a committee of inspection is sufficient evidence to support an estoppel preventing a creditor from impugning the deed of assignment. Here the evidence of the petitioning creditors' acquiescence is contained in the affidavit of Mr. Goodwin, the chairman of the meeting of creditors and afterwards a trustee of the deed. He says that the petitioning creditors were represented by a Mr. King. Then he says that the petitioning creditors were ready "to agree "in principle to a deed of assignment, the desirability whereof "they recognized, but that they felt that their own nominee "should be appointed as trustee thereof jointly with myself." They failed to secure a seconder for the proposition that their own nominee should be appointed a trustee. They then had an opportunity of saying that as they had failed to obtain the nomination of their candidate jointly with Mr. Goodwin, they declined to have anything more to do with the deed of assignment and reserved all their rights as petitioning creditors to take such course as they might be advised, but they did not do so. Mr. King might have said that at that time on their behalf, and it does not support their case that he abstained from doing so. There was a subsequent resolution for the appointment of a committee of inspection, and again there was an opportunity for the petitioning creditors' representative, if he so desired, to oppose the carrying out of the deed by the appointment of a committee of inspection, to say that his clients did not agree to any committee being appointed now that their nominee had not been appointed trustee. Instead of doing that, they allowed the resolution appointing the committee to be carried nemine contradicente—without opposition—and they are therefore in exactly the same position as if Mr. King on their behalf had voted for the resolution. I cannot myself imagine any stronger facts to bring the case within the section of the Act to which I have referred than that the petitioning creditors were themselves privy to the appointment of the trustees of the deed of assignment and to the appointment of a committee of inspection which could only be appointed if the assignment went through.

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(1) L. R. 2 Ch. 374.

(2) [1936] Ch. 165.

For these reasons, I think the learned registrar decided the case on a wrong ground and that this appeal should succeed, with costs.

SLESSER L.J. I am of the same opinion. On April 4, 1938, a full meeting of creditors of this debtor was held. They were shown a statement of affairs, and the question was put whether they would agree to a deed of assignment in favour of Mr. Goodwin and Mr. Green as trustees. Mr. King of the firm of solicitors representing the petitioning creditors stated that he was instructed that they agreed in principle to a deed of assignment, though they desired that their own nominee should be appointed as trustee thereof with Mr. Goodwin. On that there was some discussion and Mr. King moved an amendment to the resolution in order to secure his purpose, substituting Mr. Fincham for Mr. Green as a trustee. The chairman asked for a seconder and there being none forthcoming the amendment failed. The resolution itself was then put to the meeting—namely, that the debtor be asked to execute a deed of assignment of the whole of his property and assets in favour of Mr. Goodwin and Mr. Green as joint trustees on behalf of the creditors. That was duly seconded, and an uncertain number of creditors present voted in favour of the proposition. No creditor voted against it and it was declared that the resolution had been carried nemine contradicente.

In my view on those facts the position of the respondent creditors was exactly the same as if they had voted for the resolution affirmatively. I think it would be wrong to hold that a person specially summoned to a meeting and necessarily representing interests which have there to be considered should stand by and tacitly assent to the passing of a resolution which could only operate in the absence of dissent, and then be allowed to turn round, be it early or late, and say that he will not be bound by the resolution. In other words, referring to the meeting of creditors in the present case, I think that after a resolution was carried which embodied the views and decision of the meeting and finally concluded the matter dealt with, it was useless for Mr. King to ask Mr. Goodwin to register his objection as he reserved all his clients' rights. He was too late in making that request.

The circumstances of this case, as my Lord has pointed out, resemble in principle the circumstances of the case of *In re A Debtor* (1), decided by Clauson J., as he then was, and Luxmoore J., in this that there also a creditor by silence and nothing else was held to be privy to what was done at the meeting of creditors in that, albeit he had allowed himself to be proposed as a member of a committee of inspection, yet on the earliest occasion he said he would not serve on the committee and refused to sign the deed. The principle there accepted to my mind needs no authority to support it, because the position of that creditor was the same as if he had voted positively for the resolution. On that principle I can come to no other conclusion than that the present case is one in which, within the provisions of s. 5, sub-s. 3, of the Bankruptcy Act, 1914, no receiving order ought to be made, and that the Court ought to dismiss the petition.

I hesitate in a sense to base my decision on estoppel; because, as has been pointed out in many of these cases, the public interest has to be safeguarded as well as the interest of the creditors of the debtor. It is sufficient to say that in my view the respondent creditors here were privy to these proceedings within the principle laid down in *Ex parte Stray* (2), and the following cases, and that it would not therefore be right that they should be able to take advantage of a situation in the creation of which they were themselves acquiescing parties.

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(1) [1936] Ch. 165.

(2) L. R. 2 Ch. 374.

I agree, therefore, that this appeal should succeed.

MACKINNON L.J. I agree.

Appeal allowed.
Leave to appeal to the House of Lords refused.

Solicitors for appellants: *Kenneth Brown, Baker, Baker.*
Solicitors for respondents: *Elvy Robb & Co.*

J. R.

QUEEN ANNE'S BOUNTY *v.* TITHE REDEMPTION COMMISSION.

[1938. Q. 533.]

C. A.

1938

MORTON J.

July 13, 27.

C. A.

Nov. 10, 11.

Tithe rentcharge—Arrears—Recovery—Tithe Redemption Commission—Notice—Proceedings—Suspension period—Tithe Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 43), *s.* 20, *sub-ss.* 3, 7, 8, 10, *proviso* (*a*).

Sect. 4, sub-s. 1, of the Tithe Act, 1936, provides for the establishment of the Tithe Redemption Commission.

Sect. 20, sub-s. 2, provides that on and after April 1, 1937, only the Commission can recover sums which become due on account of tithe rentcharge on or before October 1, 1936.

By sub-s. 3: " No legal proceedings for the recovery of arrears " of a rentcharge shall be commenced or continued by the Com- " mission on or after the said first day of April until one month " after the person who would have been entitled to recover the " arrears (in this section referred to as the 'tithe-owner') has, " by notice in writing served after that date, given to the person " who for the purposes of an application for an order under " section two of the Tithe Act, 1891, for the recovery of the " arrears would be treated as the owner of the land out of which " the rentcharge issued (in this section referred to as the 'tithe- " 'payer'), and to the Commission, particulars in writing in the " prescribed form of the arrears which the tithe-owner claims to " be recoverable from the tithe-payer."

By sub-s. 10: " The right to recover arrears vested in the " Commission by this section may be enforced in any manner " in which the right of the Commission to recover an instalment " of an annuity may be enforced under section sixteen of this " Act:

" Provided that—(*a*) the provisions of subsection (2) of section " ten of the Tithe Act, 1891 (which provides that a sum on account " of tithe rentcharge shall not be recoverable under that Act " unless proceedings for such recovery have been commenced before " the expiration of two years from the date at which it became " payable), shall have effect in relation to the recovery of arrears " by the Commission from a tithe-payer, so, however, that in " reckoning the said period of two years time after the tithe-owner " has served a notice for the purposes of subsection (3) of this " section on the tithe-payer, during which legal proceedings may " not, by virtue of this section, be commenced or continued, shall " be excluded ":—

Held, by Morton J. and the Court of Appeal, that " time after the " tithe-owner has served a notice . . . . during which legal pro- " ceedings may not . . . . be commenced or continued " begins with the day after the day when the tithe-owner gives to the tithe-payer the notice required by sub-s. 3.

Goldsmiths' Co. v. *West Metropolitan Ry. Co.* [1904] 1 K. B. 1 considered.

C. A.
1938
QUEEN ANNE'S BOUNTY
v.
TITHE REDEMPTION COMMISSION.

Held, by the Court of Appeal (affirming the decision of Morton J.)
1. that the latter part of sub-s. 10 proviso (*a*) refers to sub-s. 3, which precludes legal action during the period which it lays down and not during the period after service of the notice as such, the month and the notice being relevant under sub-s. 3 only to fix the period therein mentioned, beginning on April 1.
2. That, in cases coming within sub-s. 3, the words " time after " in sub-s. 10 proviso (*a*) have the same meaning as " one month after " in sub-s. 3.

ADJOURNED SUMMONS.

This summons was taken out by the Governors of Queen Anne's Bounty (hereinafter called " the plaintiffs ") for the determination of a question arising under s. 20, sub-s. 10, proviso (*a*), of the Tithe Act, 1936, and relating to the service, in accordance with the provisions of the Act, of notice by tithe-owners to tithe-payers giving particulars of arrears of tithe rentcharge claimed to be recoverable.

At all material times before April 1, 1937, the plaintiffs were owners, within s. 20, sub-s. 3, of tithe rentcharge charged on lands in many parishes. On September 30, 1937, they sent by registered post to about 1000 tithe-payers notices in the prescribed form as to arrears payable on October 1, 1935, and not yet paid. For the purposes of the present case it was assumed that the notices reached them on October 1, 1937. On September 30, 1937, notices were sent also to the Tithe Redemption Commission (hereinafter called "the defendants ") in accordance with s. 20, sub-s. 3. On November 2, 1937, the defendants, at the plaintiffs' request, began county court proceedings to recover the arrears, but, on February 11, 1938, there was sent on their behalf to the plaintiffs a letter stating that proceedings would be discontinued unless the plaintiffs obtained a judicial construction of s. 20, sub-s. 10, proviso (*a*).

Accordingly, on March 2, 1938, the plaintiffs issued this summons on which, as well as asking when the period described in the sub-section commenced, they asked, alternatively, that the defendants, as trustees for the plaintiffs under s. 20, sub-ss. 7 and 8, might be directed to abstain from discontinuing county court proceedings on the ground only that the defendants alleged the arrears to be irrecoverable on the assumption that the day on which the notice was given was included in reckoning the period of two years referred to in s. 20, sub-s. 10, proviso (*a*).

H. B. Vaisey K.C., *F. H. L. Errington* and *A. H. Armstrong* for the plaintiffs. The Court may have to consider questions relating to fractions of a day. The defendants are a statutory body constituted under the Tithe Act, 1936, for the purpose of carrying out certain duties thereunder. Their only interest is to carry out those duties, and they are, in fact, part of the machinery created by the Act. The difficulty that has arisen in the present cases has been created by that part of s. 20, sub-s. 10, proviso (*a*), of the Act which begins with the words "so, however." The proviso first of all sets up a period of limitation, and, in the present case, the Court is concerned with tithe rentcharge which fell due on October 1, 1935. On the supposition that the proviso ended with the words "from "a tithe-payer," it seems reasonably clear that tithe rentcharge due on that date could be sued for up to and including October 1, 1937.

What happened was that the notice served for the purposes of s. 20, sub-s. 3, of the Act was in fact served by being sent, in accordance with the Act, by registered post on September 30, 1937, and arrived in due course of post on the morning of October 1, 1937. The Court is now asked to determine whether the time excluded begins with the day of service, the hour of service, or the following day. On November 2, 1937, a month having expired from October 1 to November 1, the defendants commenced the proceedings requisite for collecting the arrears which the Court is now considering and which, really, they were collecting for the plaintiffs, for whose benefit the proceedings would have enured. The defendants, however, began to feel misgivings: the letter of February 11, 1938, on their behalf, was sent to the plaintiffs, and the present summons was issued. The proceedings have been brought at the defendants' request, to have it decided whether the contention that the period of exclusion begins with the hour of service is good. If the defendants are right and the plaintiffs are out of time, the very curious effect is that a day has been lost.

The people who are really affected are the tithe-payers who might be in a position to resist these claims : in *Queen Anne's Bounty* v. *Tithe Redemption Commission* (1) a representative tithe-payer was before the Court.

The present case arises in the following circumstances. By the Tithe Act, 1925, all tithe that had been the property of a large number of small corporations sole, so far as held on behalf of benefices, became vested in the plaintiffs, who became the legal owners of it. The effect of that was to make a vast amount of work for the plaintiffs, and the Tithe Act, 1936, threw upon them the duty of serving certain notices, of which 50,000 had to be served : and details had to be obtained from agents, many of whom were no longer acting. Thus, between July 9 and October 1, 1937, a vast number of notices were served and the present case is concerned with notices which were served at the last minute.

At the moment when the notice is served the running of the time of two years is stopped. There are a few hours which have to be tacked on to the inter-calary period, and it is not too late to serve the notices on October 1, 1937. The time to be excluded is the time after the service of the notice. Under s. 20, sub-s. 3, of the Act there must be individual service on the tithe-payer and on the defendants, and the reference in that sub-section to s. 2 of the Tithe Act, 1891, is careful to define the tithe-payer.

Although the first part of s. 20, sub-s. 10, proviso (*a*), is for the benefit of the tithe-payer, the second part of it is for the benefit of the tithe-owner, because in some circumstances it prolongs the period during which he may recover, or have recovered for him, that to which he is entitled. If the effect of the proviso is that, in the present case, the plaintiffs are to lose the last two days, the proviso is being construed against the persons for whose benefit it was enacted.

But for the part of the proviso beginning with the words "so, however," proceedings could have been taken at the end of October 1, the month being the month up to and including November 1: and November 2 is the day, and the only day, on which action can be begun. The question is whether the time excluded begins with the day on which the notice is served, or with the hour at which it is served, or with the following day. What is being said against the plaintiffs is that when the notice was served their sand-glass was empty, i.e., their time had run out.

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(1) [1938] Ch. 229.

Most tithe-payers are quite small people, and if the Government took proceedings in every county court in the country, it might be that this point would not be taken even in one instance. The defendants' attitude seems to be that, if they are not sure of their own case, they are not going to take proceedings which may result in the recovery of money. In *Queen Anne's Bounty* v. *Tithe Redemption Commission* (1) it was argued that "arrears" did not include judgment debt arrears. Bennett J. held that they did, and the defendants collected the judgment debt arrears with the rest. The plaintiffs now want from the Court a declaration that the defendants will be carrying out their duties by pressing for the arrears in the present case.

Two propositions on the question are set out in Norton on Deeds, 2nd ed., p. 174. The first is: "A day is a period of "twenty-four hours, and each calendar day commences at "midnight the instant of midnight being common to both the "preceding and the succeeding day." The second is: "Although a day consists of a period of twenty-four hours, a "day is, except in cases where it is necessary to distinguish "acts done, or events happening, on the same day, con-"sidered at law as an indivisible period or punctum temporis." Then there is cited the proposition from Blackstone's Commentaries, Book II., 8th ed., p. 141: "In the space of a day "all the twenty-four hours are usually reckoned; the law "generally rejecting all fractions of a day in order to avoid "disputes . . . . "

There are three material periods:—

(1.) The period in s. 20, sub-s. 3, during which proceedings

(1) [1938] Ch. 229.

C. A.
1938

Queen Anne's Bounty v. Tithe Redemption Commission.

are prohibited, i.e., from April 1, 1937, until one month after the service of particulars. This might be called the "exclusion "period."

(2.) The period mentioned in sub-s. 10, proviso (*a*)—two years from the date at which tithe rentcharge became payable.

(3.) The period, in the same proviso, "time after the tithe-"owner has served a notice . . . . during which legal pro-"ceedings may not . . . . be commenced or continued." This might be called the "suspension period."

For the purpose of calculating the one month —(period 1) and the two years (period 2), it is clear that the day on which the notice was served and the day on which the rentcharge became payable must be excluded; *Goldsmiths' Co.* v. *West Metropolitan Ry. Co.* (1); but the change of wording in the phrase "time after" indicates that the third period is to run from the actual service of the notice—or, as the law takes no account of the parts of a day, from the commencement of the day on which it was served.

Compare the rule which defines the period within which a notice of appeal may be served as a period of twenty-one days after the date of the judgment appealed from; in this case no one could contend successfully that a notice served on the day of the date of the judgment would not be within the period.

The plaintiffs contend that from the moment of the service of notices the suspension period begins. If the period of suspension cut in before the two years' period came to an end, then there must be a bit to be added on at the other end, and the notices were not served too late. The Court is asked to say that there was still some sand in the plaintiffs' glass, and that the clock was not fully run down.

[They referred to *In re North* (2); *Goldsmiths' Co.* v. *West Metropolitan Ry. Co.* (1); *Russell* v. *Ledsam* (3); *Anonymous* (4); *Pugh* v. *Leeds* (*Duke*) (5); *Norris* v. *Gawtry Hundred* (6);

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(1) [1904] 1 K. B. 1.

(2) [1895] 2 Q. B. 264.

(3) (1845) 14 M. & W. 574, 581, 582.

(4) (1700) 1 Raym. 480.

(5) (1777) 2 Cowp. 714, 717.

(6) (1617) Hob. 139.

South Staffordshire Tramways Co., Ld. v. *Sickness and Accident Insurance Association, Ld.* (1)]

C. A.
1938
QUEEN ANNE'S BOUNTY v. TITHE REDEMPTION COMMISSION.

Sir Donald Somervell A.-G. and *Hubert Hull* for the defendants. It is not correct to say that the defendants are statutorily constituted trustees for the plaintiffs, although they are under a statutory duty to make certain payments for them. Also, in cases where they are satisfied that the tithe-payers are liable, and that there is a reasonable prospect of recovering the money, it is their duty to take all steps to do so. In the present case, they do not think that there is either liability or likelihood of recovery, and they feel that county court proceedings would therefore be unjustified.

There is nothing in the Tithe Act, 1936, to prevent tithe-owners taking legal proceedings until April, 1937, in respect of tithe rentcharge due before October 2, 1936. The tithe-owner has the period from April 2, 1937 to a date which, according to the defendants is September 30, and to the plaintiffs October 1, 1937, in which to serve the notice on the defendants and on the tithe-payer. It is common ground that after the notice is served at any time from April 1 to September 30 the Statute of Limitations will not prevent proceedings from being taken for the recovery of the instalments as and when they can be taken. Therefore the only question between the parties is whether, in order to prevent the recovery of these instalments from being barred by the Statute of Limitations, the tithe-owner had from April 2 to September 30, or to October 1, to serve the notice.

There is no sort of presumption as to a day being lost, one way or the other. It may be that, as a result, things have to be done within six months short of a day: but there is no presumption, one way or the other, as to what the result is likely to be.

The sum became payable on October 1, 1935. The plaintiffs say that "two years from the date at which it became payable" excludes the October 1 on which it became payable, and that a writ can be issued on October 1, 1937. Comparing the words with those which the Court has to construe, the words in

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(1) [1891] 1 Q. B. 402.

s. 10, sub-s. 2, of the Tithe Act, 1891, are "two years from the "date at which it became payable." In s. 20, sub-s. 10, proviso (*a*), of the Tithe Act, 1936, they are "time after the tithe-"owner has served a notice." If the Court is considering shades of difference of meaning, the word "from" is clearly more apt to include the day than is the word "after."

As to authorities, the case is covered by *Goldsmiths' Co.* v. *West Metropolitan Ry. Co.* (1)

If the plaintiffs are right in contending that "time after "the tithe-payer has served a notice" includes the day on which the notice was served, there is great difficulty in seeing why s.20, sub-s. 3, has not a similar meaning, and why the day on which the notice is served is not to be included in the period given by s. 10, sub-s. 2, of the Tithe Act, 1891.

H. B. Vaisey K.C. in reply.

Cur. adv. vult.

1938. July 27. Morton J. This is an application by originating summons under Order 54 (*a*) of the Rules of the Supreme Court, the plaintiffs being the Governors of the Bounty of Queen Anne for the augmentation of the maintenance of the poor clergy, commonly known as "Queen Anne's Bounty," and the defendants being the Tithe Redemption Commission established by the Tithe Act, 1936. The summons asks for the determination of a question of some difficulty which affects a large number of tithe-payers. I state the question in the following terms: "Whether upon the true "construction of s. 20, sub-s. 10, proviso (*a*), of the Tithe Act, "1936, the period which I refer to hereafter as 'the suspension "period' begins with the day on which, under s. 20, sub-s. 3, "of the Act, the tithe-owner has given to the tithe-payer the "notice referred to in the same sub-section, or with the hour "of service of such notice, or with the following day."

In order to render this question intelligible and to explain why these proceedings were instituted, I must read certain sections of the Tithe Act, 1936, and state certain facts. Sect. 1 of the Act is in the following terms: "Subject to the

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(1) [1904] 1 K. B. 1.

"provisions of this Act, all tithe rentcharge shall be extinguished "on the second day of October, nineteen hundred and thirty-"six (in this Act referred to as 'the appointed day'), and "accordingly as from that day the land out of which any tithe "rentcharge issued immediately before that day shall be "absolutely discharged and freed therefrom."

It is to be observed that the tithe rentcharge which became payable on October 1, 1936, or on any earlier date is not extinguished by that section. Sect. 4, sub-s. 1, provides as follows: "There shall be established for the purposes of this "Act a Commission to be called the 'Tithe Redemption "Commission' (in this Act referred to as 'the Commission'), "consisting of a chairman and not more than four other "commissioners appointed by the Treasury after consultation "with the Minister of Agriculture and Fisheries (in this Act "referred to as 'the Minister')."

I now turn to s. 20, and I shall first of all read sub-ss. 1 and 2. Sub-sect. 1 is as follows: "The extinguishment by this Act "of tithe rentcharge shall not affect any right or liability "in respect of sums which became due on account thereof "before the appointed day (in this Act referred to as "'arrears')". Sub-sect. 2 is: "On the first day of April, "nineteen hundred and thirty-seven, power to recover and give "a discharge for arrears shall vest in the Commission to the "exclusion of any other person, and the subsequent pro-"visions of this section shall have effect with respect to the "recovery thereof on or after that date." The result is that on and after April 1, 1937, any sums which became due on account of tithe rentcharge before October 2, 1936, could be recovered only by the Commission. Sub-sect. 3 is as follows: "No legal "proceedings for the recovery of arrears of a rentcharge shall "be commenced or continued by the Commission on or after "the said first day of April until one month after the person "who would have been entitled to recover the arrears (in this "section referred to as the 'tithe-owner') has, by notice in "writing served after that date, given to the person who for "the purposes of an application for an order under section two "of the Tithe Act, 1891, for the recovery of the arrears would be

C. A.
1938
Queen Anne's Bounty v. Tithe Redemption Commission.
Morton J.

"treated as the owner of the land out of which the rentcharge "issued (in this section referred to as the 'tithe-payer') "and to the Commission, particulars in writing in the prescribed form of the arrears which the tithe-owner claims to be "recoverable from the tithe-payer."

In my view it is clear that the period of one month mentioned in this sub-section does not begin to run until after the tithe-owner has given the prescribed notice in writing, both to the tithe-payer and to the Commission. Nothing turns upon this distinction in the present case, since the tithe-owners concerned in fact gave notice at the same time to the tithe-payers and to the Commission. A more important question is, at what point of time does the period of one month begin, and when does it end? On this question, counsel for the plaintiffs and the defendants are agreed that the day on which the notice is given must be excluded from this period, in view of certain authorities, and in particular, the case of *Goldsmiths' Co.* v. *West Metropolitan Ry. Co.* (1) The result is that in the case, for instance, of a notice given on October 1, 1937, the period of one month would end at midnight on the night of November 1-2, 1937.

I think it is convenient to state at this point some of the facts leading up to the present application. The plaintiffs were at all material times prior to April 1, 1937, owners within s. 20, sub-s. 3, of the Tithe Act, 1936, of tithe rentcharge charged upon lands in many parishes in England. On September 30, 1937, the plaintiffs sent by registered post to upwards of 1000 tithe-payers notices in the prescribed form relating to arrears of tithe rentcharge which became payable on October 1, 1935, and had not yet been paid. The reason why the notices were delayed so long was stated by counsel for the plaintiffs, and I entirely accept his statement. The reason for the delay is not, however, material for the purposes of the present case. The relevant question is, what is the effect of the delay? It has been assumed for the purposes of this case that the notices so posted reached the tithe-payers on

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(1) [1904] 1 K. B. 1.

October 1, 1937. On September 30, 1937, notices in the prescribed form were sent also to the defendants, in accordance with s. 20, sub-s. 3. The result was that proceedings could not be commenced against the tithe-payers for recovery of the arrears in question until one month after service of the notices. As the notices were served on October 1, 1937, it follows from what I have already said that proceedings against the tithe-payers could not be commenced until after midnight on the night of November 1-2, 1937. Sub-sects. 4 to 7 inclusive of s. 20 give the tithe-payer an opportunity of having his case referred to a Committee called the "Arrears Investigation Committee." I need not read these sub-sections, as not one of the tithe-payers concerned took advantage of their provisions.

Sub-sect. 8 is in the following terms: "As respects any "arrears as to which a tithe-payer does not claim a reference "to the Committee within one month after service on him of a "notice giving particulars thereof served for the purposes of "subsection (3) of this section, or within such extended period "as may have been allowed under subsection (4) of this section, "the Commission shall at the expiration of that period, unless "they are satisfied, after consultation with the tithe-owner, "that the tithe-payer is not legally liable for the payment "thereof, or that there is no reasonable prospect of the recovery "thereof or of any part thereof, take all requisite steps, "including if necessary the commencement or continuance "of legal proceedings, for the recovery thereof, and pay to the "tithe-owner a sum equal to the amount thereof in respect of "which the tithe-payer has admitted or admits legal liability or "the court has made or makes an order for recovery." As will appear later, this sub-section is of some importance in the present case.

I need not read sub-s. 9, and I now turn to sub-s. 10, which begins as follows: "The right to recover arrears vested in the "Commission by this section may be enforced in any manner "in which the right of the Commission to recover an instalment "of an annuity may be enforced under section sixteen of this "Act." It is not necessary for the purposes of this case to

C. A.
1938
Queen Anne's Bounty
v.
Tithe Redemption Commission.
Morton J.

state the manner in which the Commission can enforce the right to recover arrears beyond saying that, in the case of the arrears with which I am concerned, proceedings could be taken in the county court. Then follows proviso (*a*), upon which the decision in this case turns. It is as follows: "Provided that: "(*a*) the provisions of subsection (2.) of section ten of the "Tithe Act, 1891 (which provides that a sum on account of "tithe rentcharge shall not be recoverable under that Act "unless proceedings for such recovery have been commenced "before the expiration of two years from the date at which it "became payable), shall have effect in relation to the recovery "of arrears by the Commission from a tithe-payer, so, however, "that in reckoning the said period of two years time after the "tithe-owner has served a notice for the purposes of subsection "(3.) of this section on the tithe-payer, during which legal "proceedings may not, by virtue of this section, be commenced or continued, shall be excluded." It is agreed by counsel on both sides, in view of *Goldsmiths' Co.* v. *West Metropolitan Ry. Co.* (1), to which I have already referred, that, in reckoning the period of two years mentioned in this subsection, the date on which the arrears become payable must be excluded. The result is that, but for the portion of the proviso beginning with the words "so, however, that," the arrears which became payable on October 1, 1935, would cease to be recoverable at midnight on the night of October 1-2, 1937.

Now comes the conflict of view between the plaintiffs and the defendants. The plaintiffs contend that in the present case the "time after the tithe-owner has served "a notice for the purposes of subsection (3.) of this section on "the tithe-payer, during which legal proceedings may not, by "virtue of this section, be commenced or continued"—which I shall call hereafter "the suspension period"—is a period of one month including October 1, 1937, the day on which notices were served under sub-s. 3. Alternatively, the plaintiffs contend that the suspension period is a period of one month beginning with the exact hour on October 1, 1937, on which such notices were received by the tithe-payers.

(1) [1904] 1 K. B. 1.

If either of these contentions is correct, the period of two years mentioned in the sub-section did not expire at midnight on the night of October 1–2, 1937, since it is necessary to exclude from that period either the whole of October 1, 1937, or that portion of October 1, 1937, which came after the hour at which the tithe-payers received the notices.

The defendants, on the other hand, contend that the suspension period does not begin until the day which immediately follows the day on which the notices are served, and therefore in the present case the suspension period did not begin before midnight on the night of October 1–2, 1937. If this contention is correct, the arrears which became due on October 1, 1935, became irrecoverable at midnight on the night of October 1–2, 1937, since the two years' period expired at that moment.

I must now state the events which took place after the service of the notices on October 1, 1937. On November 2, 1937, the defendants, at the request of the plaintiffs, commenced proceedings in the county court for recovery of the arrears in question. On February 11, 1938, a letter in the following terms was sent on the defendants' behalf to the plaintiffs: "I am directed to refer to the notices served "by Queen Anne's Bounty under s. 20, sub-s. 3, of the Tithe "Act, 1936, in respect of arrears of tithe rentcharge due on "October 1, 1935. The Commission will not take steps for "the recovery of arrears which are 'irrecoverable' in the "sense of proviso (*a*) to sub-s. 10, of s. 20, and, as you are "aware, they have been advised that there fall within this "class of irrecoverable arrears, all arrears of tithe rentcharge "due on October 1, 1935, in respect of which notices were "served by the tithe-owner on the tithe-payer after "September 30, 1937, and for the recovery of which application "had not been made by the tithe-owner to the county court "prior to April 1, 1937. It was only because your Governors "had been advised that notices served on tithe-payers on "October 1, 1937, protected those arrears from being "irrecoverable, that the Commission filed applications in the "county court for their recovery in order not to deprive the

C. A.
1938
Queen Anne's Bounty v. Tithe Redemption Commission.
Morton J.

"Bounty of an opportunity of obtaining a judicial construction of the proviso referred to above. By a letter of "December 3, 1937, the Bounty were informed that the "Commission would afford every facility and would be "prepared to co-operate with them in order that the issue "should be determined by the High Court. Having regard "to the time which has elapsed since the matter was first "raised and to the desirability of terminating the present "position, I have now to inform you that it is the intention of "the Commission to discontinue all the proceedings which have "been commenced in the county court in respect of the arrears "in question, unless the Bounty commence proceedings "without undue delay to obtain a judicial construction."

As a result of that letter the originating summons which is now before me was issued on March 2, 1938. The position is that the defendants say: "The arrears in question are "irrecoverable by reason of proviso (*a*) to sub-s. 10 of s. 20 "of the Act, and therefore we propose to discontinue the "county court proceedings." At first sight this contention would appear to be well founded. The arrears in question became payable on October 1, 1935, and proceedings for their recovery were not begun until November 2, 1937. If one adds together the period of two years mentioned in sub-s. 10 and the period of one month which has to be added thereto by the joint effect of sub-ss. 10 and 3, it would appear that the proceedings were begun one day too late. But the plaintiffs say that the proceedings were begun in time, that the arrears are not irrecoverable, and that the defendants are bound to continue the proceedings in view of the provisions of sub-s. 8 of s. 20. The position is therefore that the parties are not agreed as to the true construction and effect of the latter part of s. 20, sub-s. 10, proviso (*a*), of the Act. The point in issue is, when did the suspension period begin? If it began before midnight on the night of October 1–2, 1937, the two years' period did not expire at midnight on that night, and the arrears may be recoverable. If it did not begin before midnight on that night, the two years' period expired before the suspension period began to run, and the arrears are not recoverable. I have arrived at the conclusion that the latter is the correct view, and that neither the whole nor any part of October 1, 1937, the day on which the notices were served, falls within the suspension period.

In order to give a consistent and logical interpretation to s. 20, sub-ss. 3 and 10, I think it is necessary to apply the same method of reckoning to the three periods which are mentioned in these sub-sections. These periods are, first, one month after the tithe-owner has, by notice in writing served after April 1, 1937, given to the tithe-payer the prescribed particulars; second, two years from the date on which the arrears became payable, and third, time after the tithe-owner has served a notice. It is admitted that in reckoning the first period the day on which the notice was served must be excluded, and that in reckoning the second period the date on which the arrears became payable must be excluded. In view of this I can see no sufficient reason why I should employ a different method in reckoning the third period.

Mr. Vaisey and Mr. Errington put the case for the plaintiffs in two alternative ways. First, they contend that the day on which the notices were served is excluded for the purpose of computing the suspension period, but is included in the suspension period itself. I agree with the first part of this contention, but I cannot accept the second part for the reason which I have already stated. Further it seems to me an inaccurate use of language to describe the day on which the notice is served as being "time after the tithe-owner has "served a notice."

In the alternative Mr. Vaisey and Mr. Errington put their argument in this way. They say that, by virtue of s. 20, sub-s. 3, no legal proceedings for the recovery of arrears can be commenced during a period beginning on, and including, April 1, 1937, and ending one month after the prescribed notice has been served; that is, in the present case, ending at midnight on the night of November 1–2, 1937. Then they say that, in the present case, the suspension period begins with the hour on October 1, 1937, at which the notice was served. Thus they say, the two years' period mentioned in the earlier part of s. 20, sub-s. 10, proviso (*a*), had not expired when the suspension period began to run. They rely upon the word " time " in the latter part of s. 20, sub-s. 10, proviso (*a*), and say that in this part of the proviso the Legislature is dealing with hours or minutes and not with days. I cannot accede to this contention. In the first place, it is only in a very limited class of cases that the law has regard to fractions of a day, and I do not think the present case falls within that class. In the second place, I think I should not be carrying out the accepted principles of construction of statutes if I failed to apply the same method of reckoning in the case of each of the three periods which I have already mentioned.

I have this further comment to make on the plaintiffs' alternative contention. It seems to me to involve the ascertainment of the exact time at which the notice was received by each tithe-payer on October 1, 1937, and of the exact time at which proceedings were begun against each tithe-payer on November 2, 1937. To give an instance, let me assume that the tithe-payer received the notice at 11 A.M. on October 1, 1937. At that hour, say the plaintiffs, there were still thirteen hours of the two years to run, and the suspension period began to run at that hour and lasted until midnight on November 1–2, 1937. Assuming that this is so, it would be necessary to see whether the remaining thirteen hours of the two years, which would begin to run at midnight on November 1–2, 1937, expired before proceedings were begun. If, for instance, proceedings were begun at 2 P.M. on November 2, they would be an hour too late. I cannot believe that the Legislature intended to deal with fractions of days in sub-s. 10, or to compel the Court to embark on any such inquiry.

For these reasons I propose to declare that the period described in s. 20, sub-s. 10, proviso (*a*), as " time after the "tithe-owner has served a notice for the purposes of subsection "(3.) of this section on the tithe-payer, during which legal "proceedings may not, by virtue of this section, be commenced "or continued," begins with the day immediately following the day on which, under s. 20, sub-s. 3, of the Act, the tithe-owner has given to the tithe-payer the notice referred to in the same sub-section.

This summons is a perfectly friendly proceeding, and the parties are two public bodies, both of whom desire enlightenment as to the construction and effect of a certain section of the Tithe Act, 1936. Under the circumstances, I think it would be right if I made no order as to costs.

C. A.

The Commission appealed. The appeal was heard on November 10 and 11, 1938.

H. B. Vaisey K.C., *F. R. Evershed K.C.* and *A. H. Armstrong* for the appellants. The effect of the statute is that a period of time is being treated as if it was a length of string. It may be necessary to reckon strictly the number of hours left, because, at the time when the notices were served, the tithe-payer had still a margin of time left. No calculation other than one reckoning the number of days that a particular person had left will fit in with the Act at all.

Under the Tithe Act, 1891, s. 10, unpaid tithe must be sued for within two years from the date when it became due. Here the tithes in question became due on October 1, 1935, and under this section would have ceased to be recoverable at midnight October 1 to 2, 1937. The Tithe Act, 1936, s. 1, extinguished tithe on October 2, 1936 (called the appointed day), and s. 4 established the Tithe Redemption Commission. Further, s. 20, sub-s. 2, vested in that body the power to recover arrears of the tithe for the benefit of the tithe-owners. Sect. 20, sub-s. 10 (*a*), excludes from the two years for the purpose of proceedings by the Tithe Redemption Commission a period of one month after the notice required to be served by the tithe-owner under sub-s. 3. That notice was in the present case given by the appellants on the morning of October 1, 1937. At that time the period till midnight October 1 to 2 remained for the commencement of proceedings and the effect of s. 20, sub-s. 10 (*a*), is to extend it by a month. Therefore, when the month expired a matter of hours remained for the Commission

C. A.
1938
QUEEN ANNE'S BOUNTY
v.
TITHE REDEMPTION COMMISSION.

to commence proceedings for the arrears. Alternatively, the whole day on which the notice was served is excluded from the two years, so that a day of the two-year period remained after the month expired. Although in considering when the notice expires the day of service is not taken into account, that does not exclude it for the purpose of sub-s. 10 (*a*). Thus the provision in Order LVIII., r. 15, for service of notice of appeals within 14 days of judgment excluding the day of the judgment, does not mean that an appeal could not be lodged on the day of the judgment. So here the day of service is not excluded for all purposes. Cases assisting the view that the day of the service of the notice is excluded are *Lester* v. *Garland* (1) and *Goldsmiths' Co.* v. *West Metropolitan Ry. Co.* (2) The authorities only deal with the time a period ends and there is no case where the Court had to decide the time for beginning and ending a period. Under sub-s. 4 the tithe-payer is given the month after service of the tithe-owner's notice as time to give a notice asking to have the matter referred to a committee. That is the time excluded from the two years and it runs in this case from the receipt of the notice to midnight November 1–2. Thus time remained within which the Commissioners could start proceedings to recover the arrears and the Commissioners are wrong in thinking that those proceedings must fail on the ground that they were brought out of time. The language of Day J. in *South Stafford Tramways Co., Ld.* v. *Sickness and Accident Insurance Association, Ld.* (3) is inapplicable to the present case.

Sir Donald Somervell A.-G. and *Hubert Hull* for the respondents. It is to be emphasized that it is common ground that the words "from the date at which it became payable" in s. 10, sub-s. 2, of the Tithe Act, 1891, mean "exclusive of the "date at which it became payable." The question turns on the construction of the words "time after the tithe-owner "has served a notice for the purposes of sub-section 3 of this "section on the tithe-payer, during which legal proceedings "may not, by virtue of this section, be commenced or continued,

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(1) (1808) 15 Ves. 248, 257.
(2) [1904] 1 K. B. 1.
(3) [1891] 1 Q. B. 402.

"shall be excluded." It is necessary to start with the day on which legal proceedings are begun, i.e., with the actual time which has in fact lapsed from the date when the tithe became payable. Under sub-s. 3, neither the tithe-owner nor any one else can, on or after April 1, 1937, take any legal proceedings until after a certain period or certain events. Tithe due on April 1, 1935, becomes irrecoverable under the statute unless proceedings are taken on or before March 31, 1937. The natural effect of sub-s. 10, proviso (*a*), is to make the period a period of two years and one month, because a month is the time prescribed in the period mentioned in sub-s. 3. On the construction put forward by the respondents, the period is two years and one month and one day. On that construction, therefore, the "time after" of sub-s. 10, proviso (*a*), is a period which, as such, is not mentioned at all in sub-s. 3. There can be no reason in principle, as there is none in authority, for construing the words "one month after" in one way, and the words "time after" in another: *South Staffordshire Tramways Co., Ld.* v. *Sickness and Accident Insurance Association, Ld.* (1) It would be most unfortunate if the Court were to allow a construction of that kind. It is a construction which makes the tithe-payer's liability depend on the exact hour of the day at which the notice arrived by post, and is quite inconsistent with the methods of construction which both sides have accepted in argument.

H. B. Vaisey K.C. in reply. Where, for the reckoning of one period, another must be excluded, it suffices if the second period begins before the first period ends. As, here, it is admitted that the first period did not end until midnight of October 1–2, there is some remanet of the first period (namely, the day on which the notice was served) standing over to be worked out at the end of the second period.

SIR WILFRID GREENE M.R. The judgment which I am about to deliver is the judgment of the Court (Sir Wilfrid Greene M.R., Scott and Clauson L.JJ.).

This is an appeal from a judgment of Morton J. upon an originating summons which raised a question as to the

(1) [1891] 1 Q. B. 402.

recoverability of arrears of tithe rentcharge in the circumstances which I will presently state. The tithe rentcharge in question became payable on October 1, 1935. It belonged at that time to Queen Anne's Bounty, who are the present appellants. At the time when the tithe rentcharge fell due there was in existence a statutory period of limitation for its recovery under s. 10, sub-s. 2, of the Tithe Act, 1891, which provides that "A sum on account of tithe rentcharge shall not be "recoverable under this Act unless proceedings for such "recovery have been commenced before the expiration of "two years from the date at which it became payable." Now it is common ground that under that provision the two year period would have expired at midnight on October 1–2, 1937; that is to say, the tithe-owner would have had the whole of October 1 in which to issue his writ. The question that arises is due to the fact that under the Tithe Act, 1936, certain modifications were made in relation to that statutory period of limitation.

As I have said, the tithe rentcharge (which I will refer to for shortness as "the tithe") belonged to Queen Anne's Bounty, but by s. 20, sub-s. 2, of the Tithe Act, 1936, the right to recover the arrears in question vested on April 1, 1937, in the Tithe Redemption Commissioners, who were established by that Act and are the respondents to this appeal. The Tithe Redemption Commission is under a statutory duty, into which I need not go in detail, to take proceedings in certain circumstances to recover arrears of tithe "unless they "are satisfied, after consultation with the tithe-owner, that "the tithe-payer is not legally liable for the payment thereof, "or that there is no reasonable prospect of the recovery "thereof or of any part thereof." The Commission, on November 2, 1937, issued plaints in the county court for the recovery of those arrears. The question that arises, and as to which the parties seek the opinion of the Court, is whether, at the date when those plaints were issued, there was no reasonable prospect of the recovery of the tithe, the substantial point being whether the period of limitation had expired before the issue of those plaints.

C. A.
1938
QUEEN ANNE'S BOUNTY v. TITHE REDEMPTION COMMISSION.

Under s. 20 of the Tithe Act, 1936, there is certain machinery provided with regard to the recovery of arrears of tithe, and its object is to give the tithe-payer who has fallen into arrear with his payments an opportunity of placing before the Commission representations of a character specified in the section. Sect. 20, sub-s. 3, and the immediately following sub-sections make provision for that. Sub-s. 3 provides that "No legal proceedings for the recovery of arrears of a "rentcharge shall be commenced or continued by the Com-"mission on or after the said first day of April," 1937—that is the day on which the arrears vested in the Commission—"until one month after" [the tithe-owner] "has by notice in "writing served after that date, given to" [the tithe-payer] "and to the Commission, particulars in writing in the pre-"scribed form of the arrears which the tithe-owner claims "to be recoverable from the tithe-payer." Sub-s. 4 provides that the tithe-payer upon whom that notice is served may within a month after service, or an extended period which the Commission have power to grant, serve on the Commission a notice requiring the matter of recovery to be referred to a committee. That committee is given power to take certain matters into consideration and to come to a decision. I need not go into the details of that more than to say that, where a tithe-payer serves such a notice, the Commission is to refer the matter to the committee and shall not commence or continue any legal proceedings for the recovery of the arrears until the matter has been disposed of by them. The effect, therefore, is that the Commission are precluded from instituting legal proceedings for the recovery of arrears for a period beginning with April 1, 1937, and ending either at the expiration of the month following the service of the notice or at the expiration of such extended period as may be required for the decision by the committee of the matters in question. In a case where the tithe-payer does not avail himself of the right to require a reference to the committee the relevant period is, of course, the month. If he avails himself of that right the period will be an extended one.

In the present case the tithe-payers, when the notices were served upon them, did not avail themselves of the right to require reference to a committee, and accordingly for the purposes of the present case the relevant period is the month. Pursuant to sub-s. 3 the present appellants sent by post on September 30, 1937, the notices referred to in that sub-section and for the purposes of the argument of the present case it is assumed that service took place on the following day, October 1, in due course of post. As I have said, the two years laid down by the Tithe Act, 1891, expired at midnight on October 1–2, and, therefore, apart from other considerations, at the date when they served the notices the appellants still had the whole of the following day, namely, October 1, in which to issue their plaints without infringing the provisions of the Act of 1891. The result, therefore, was that between the actual moment of service (which, for the sake of argument, I will take to be 10 o'clock in the morning) and midnight on October 1–2, there were remaining 14 hours of the last day of the two-year period laid down by the Tithe Act, 1891. Sect. 20, sub-s. 10, of the Act of 1936, after providing for the method of recovery of arrears vested in the Commission, has this proviso: "Provided that (*a*) the provisions of sub-"section 2 of section ten of the Tithe Act, 1891 . . . . shall "have effect in relation to the recovery of arrears by the "Commission from a tithe-payer, so, however, that in reckon-"ing the said period of two years time after the tithe-owner "has served a notice for the purposes of sub-section 3 of this "section on the tithe-payer, during which legal proceedings "may not, by virtue of this section, be commenced or continued, "shall be excluded."

The question at first sight appeared to be one of some difficulty, but, after the careful arguments on both sides to which we have listened, we have come quite clearly to the conclusion that the learned judge's decision was right.

The appellants put their case in this way. They say that when you are computing the period of two years (which in the present case, as I have said, would have expired at midnight on October 1–2, 1937) you are to exclude from the computation of that period a period of time beginning with the actual moment at which the notice was served. They point out that the language used is "time after the tithe-owner has served "a notice," and they say in the present case that the tithe-owner served the notice at 10 o'clock on the morning of October 1, and therefore that is the beginning of the period of time mentioned; but the time is further defined as being a time during which legal proceedings may not be commenced or continued, and they say that the time during which legal proceedings may not be commenced or continued, with reference to which the notice in question is relevant, is the period of one month referred to in sub-s. 3, beginning, on the facts of this case, at midnight of October 1–2. Then they proceed to say: If you exclude that period, beginning with the actual moment of service and ending midnight, November 1–2, from the two-year period, what is left? The answer is that there is left of the two-year period 14 hours; that is to say, the 14 hours which elapse between 10 o'clock on the morning of October 1 and midnight of October 1–2 are to be added, so to speak, at the other end, which would give the Commission 14 hours from midnight, November 1–2, in which to issue the writ, and any writ issued within those 14 hours would be in time. Alternatively, they say that they had not those 14 hours only, but the whole of November 2 up to midnight of November 2–3.

It is to be observed with regard to this alternative contention that the effect of giving that construction to the language used would be to extend the two-year period by 14 hours. We do not think that that is a construction which, upon any view, could be supported, because we can see no justification in the language used for extending the period in that way. The more attractive alternative, in one sense, so far as regards the literal meaning, or what might be thought to be the literal meaning of the language used, is the other, but it involves some very remarkable consequences. If that construction were right, it would be necessary in each case to ascertain precisely the moment of service of the notice and it would be necessary in each case to ascertain precisely the moment of issue of the writ. It would be necessary to ascertain the former in order to fix, by reference to hours, the exact currency of the two-year period, and to ascertain how much, in the present case, of November 2 was available for that purpose. It would be necessary to ascertain the moment of time when the writs were issued in order to ascertain whether the issue of the writs took place within the period so ascertained. Anything more inconvenient it is difficult to imagine, but, of course, that by itself is no ground whatever for placing upon the language of a statute a construction which does not accord with its true meaning.

In our judgment, the fallacy which underlies the appellants' argument consists in a failure to give full effect to the circumstance which I am about to mention. The crucial words at the end of sub-s. 10, proviso (*a*), are referential. They are not dealing with some independent period beginning with the service of a notice, but they are referring to something which has gone before, and that something which has gone before is to be found in sub-s. 3. When sub-s. 3 is properly analysed certain points emerge. First, there is no prohibition against bringing proceedings during the period after service of the notice as such. The prohibition is a prohibition extending over the period of time laid down in the sub-section. That period of time begins on April 1, 1937. It ends at a point of time which is to be ascertained by reference to the period of one month after service of the specified notice. In other words, the notice and the month are only relevant under sub-s. 3 for the purpose of fixing the end of the period in sub-s. 3, which begins on April 1. That is what I mean by saying that the period between the service of the notice and the expiry of the month is not the subject-matter of some independent prohibition of its own. It is merely part of the machinery for fixing a date.

Now it is common ground that, upon the true construction of sub-s. 3, the month after the service of the notice is to be calculated as from the midnight following the actual time of service. In the present case the month is to be calculated as from midnight of October 1–2, service being assumed to have taken place at 10 o'clock on the morning of October 1. That construction is in accordance with the general principle of construction of documents, including statutes, under which, unless the context otherwise requires, when a period is referred to as a period after the happening of an event, the day on which the event actually happens is excluded from computation. Of course, there may be circumstances in which, for the purpose of doing justice, the precise moment of service of a document or precise moment of the occurrence of an event may be a material and vital consideration, in which case it has to be ascertained ; but the general principle which I have stated is well established and is not disputed.

The only object, therefore, of the service of the notice under sub-s. 3 may be said to be to fix the relevant midnight for the commencement of the month mentioned in that sub-section. Apart from that, it is of no importance, so far as the period is concerned, although, of course, its importance as being the thing which puts the tithe-payer in a position to take certain steps exists, but that is a different matter altogether. So far as the period is concerned, its only importance is to fix the period of the month.

There is one other matter in reference to the words in the proviso "time after the tithe-owner has served a notice" which I must mention, and it is this. As I have already pointed out, sub-s. 3 provides for the period of one month. Sub-ss. 4 and 5 provide for cases where that period may be extended, and may be extended for an uncertain period. Accordingly, when the legislature, in sub-s. 10, proviso (*a*), finds itself compelled to refer to periods dealt with in the earlier sub-sections, it cannot simply say "the period of one "month mentioned in sub-section 3" which would have placed the present question beyond all doubt, but it is compelled to use a form of words which, as a matter of construction, will cover not merely what I may call the basic period of one month, but also the extended period, if any such there be.

The two opposing constructions, I think, can be summed up very shortly by taking two paraphrases of the words under discussion. I think, after what I have said, the usefulness of these paraphrases for the purpose of bringing out the point will be apparent. It is said on behalf of the respondents that the phrase "time after the tithe-owner has served a notice for "the purposes of sub-section 3 of this section on the tithe-"payer, during which legal proceedings may not, by virtue of "this section, be commenced or continued" means "that "portion of the period beginning on April 1, 1937, during "which legal proceedings may not be commenced, which "consists of the month mentioned in sub-section 3 or the "extended period mentioned in sub-sections 4 and 5." That is one paraphrase and, obviously, if that be the true meaning, the words "time after" in reference to the facts of the present case mean the same thing as "one month after" in sub-s. 3.

The alternative paraphrase, while accepting down to a point the one which I have just stated, puts in this qualification, "that in reckoning the period of two years so much time "as elapses after the service of the notice shall not be reckoned." In other words, the words "time after" are to be construed not as referring to the "month after," referred to in sub-s. 3, but to the actual period of time which, in truth and in fact, according to the clock, begins to run at the moment of service.

In our opinion, the former paraphrase accurately states the true meaning and effect of the words. Indeed, once it is appreciated that the words are referential, that they are a comprehensive formula for bringing into the machinery of this sub-section a particular portion of the period during which proceedings specified in sub-s. 3 are not permissible, and once it is borne in mind that the service of the notice under sub-s. 3 has, as I have already said, no effect for the purpose of that provision save that of fixing the relevant month, the whole scheme of this section fits together, and we think that the true construction of the words, when the matter is really gone into and understood, is beyond question.

The alternative construction, as I have said, not merely leads to results of a highly anomalous and inconvenient description, but it does not appear to us to fit in with the scheme of this section and the language in which it is expressed. It really rests on a too literal attention to the words "after the "tithe-owner has served," and impressing upon those words a definite reference to the point of time of service. I have to point out that, even taking the words literally, that is by no means a necessary construction of them because the month in question, beginning at midnight of October 1–2, is after the service which took place at 10 o'clock on the morning of October 1.

The appellants point out that the effect of this construction is, in one sense, to deprive them of 14 hours out of their two years, because they say that whereas, apart from this legislation, they would have had up to midnight of October 1–2, they do not now get that period, but only a portion of it. That, in a sense, is true, but it is not a circumstance which would justify us in giving to what we conceive to be the clear intent of the language used a construction which it does not fairly bear. It is fair to point out, and indeed it was not disputed, that the Act does quite clearly in one case deprive the tithe-owner of a day out of his two years. The case in question is that of tithes which fell due on April 1, 1935. In that case no notice can be served until after April 1. The prohibition against bringing actions begins on and includes April 1 itself, and the result of that position is that, unless proceedings had been begun by the tithe-owner himself on March 31, which, of course, is the day before the arrears vested in the Commission, that tithe would be irrecoverable, notwithstanding the fact that the two years had not elapsed by one day. It is not perhaps surprising that in trying to fit in periods in this way there should be some slight lack of coincidence in respect of a day or part of a day. In one case it clearly happens. I myself find nothing in the fact that, in the present case, it would appear to happen in respect of those odd hours which strikes me as being so surprisingly unjust or so little to be expected as to justify departing one little bit from the prima facie and, in our opinion, clear meaning of the statute.

In the result, the appeal is dismissed, with costs.

Appeal dismissed.

Solicitors: *Solicitor to Queen Anne's Bounty*; *Official Solicitor to Ministry of Agriculture and Fisheries.*

K. R. A. H.

C. A.

1938

BENNETT J.

July 27.

C. A.

Nov. 3; *Dec.* 6.

HAILE SELASSIE *v.* CABLE AND WIRELESS, LIMITED (No. 2).

[1937. H. No. 28.]

International law—Recognition de jure of foreign sovereign—Claim by sovereign to fund also claimed by another foreign state—Status of sovereign no longer de facto ruler.

The Director-General of Posts, Telegraphs, and Telephones of Ethiopia, a sovereign power, entered into a contract, as agent for the sovereign, with a radio telegraphic company, as a result of which a sum of money became due as part of the public revenues of that power. The country was subsequently conquered and governed by a foreign power, Italy. The original sovereign was still recognized by the Government of this country as de jure sovereign and the conquering power was recognized as being in control de facto :—

Held, that nothing had happened to divest the title formerly vested in the sovereign, and that the right to sue for the money and to recover it was vested in him.

Observations of Lord Cairns in *United States of America* v. *Wagner* (1867) L. R. 2 Ch. 582 at p. 593 applied.

While an appeal by the defendants was pending, the Government of this country recognized the King of Italy as de jure Emperor of Ethiopia, and it was admitted that this recognition acted retrospectively. The Court of Appeal accordingly allowed the appeal and dismissed the action.

ACTION.

The plaintiff commenced these proceedings for the purpose of obtaining an order for an account of what was due under a contract made between the Director-General of Posts, Telegraphs and Telephones of Ethiopia of the one part and the defendant company of the other part, and payment by the defendant company of what should be found due on the taking of such account. The contract related to the transmission of wireless messages between an Ethiopian State radio telegraphic station at Addis Ababa in Ethiopia and a radio telegraphic station of the defendant company in Great Britain. The relevant provision of the contract was that the charges paid by the senders of telegraphic messages between the two stations should be apportioned in the proportion of two-thirds to the transmitting station and one-third to the receiving station.

C. A.
1938
HAILE SELASSIE
v.
CABLE AND WIRELESS, LD. (No. 2).

As a result of the war between Italy and Ethiopia the radio telegraphic station at Addis Ababa was closed on May 2, 1936.

At the hearing of the action the parties agreed that the sum payable by the defendant company under the contract was 10,613*l.* 11*s.* 3*d.* The only point to be decided in the action was whether, having regard to recent events in Ethiopia and to the attitude taken up by His Majesty's Government in relation to the plaintiff and to the de facto control of the Italian Government in Ethiopia, the plaintiff was entitled to recover judgment against the defendant company for the above mentioned sum.

It was ascertained from the Foreign Office that (1.) His Majesty's Government still recognized the plaintiff as de jure Emperor of Ethiopia; (2.) that His Majesty's Government recognized the Italian Government as the Government de facto of virtually the whole of Ethiopia; and (3.) that an Envoy Extraordinary and Minister Plenipotentiary from His Majesty the Emperor of Ethiopia was accorded recognition at the Court of St. James.

The defendants proved that, in addition to the claim made to these moneys by the plaintiff, a claim to them on behalf of His Majesty the King of Italy had been made by his Ambassador in certain correspondence since the issue of the writ in the action.

BENNETT J. held (*Haile Selassie* v. *Cable and Wireless, Ld.* [1938] Ch. 545) that the Court had no jurisdiction to decide the rights of the plaintiff, having regard to the claim by the other foreign state.

The plaintiff appealed.

The Court of Appeal (SIR WILFRID GREENE M.R., SCOTT and CLAUSON L.JJ.) allowed the appeal and remitted the action to the Chancery Division ([1938] Ch. 839).

The following arguments relating to the legal position of a person recognized as a sovereign de jure of a foreign country of which another power was in occupation de facto were adduced at the previous hearings before Bennett J., but in view of his Lordship's decision that the Court had no jurisdiction to decide the rights of the plaintiff, having regard to the claim of the Italian Government, those arguments became immaterial until the case had been remitted by the Court of Appeal.

Andrew Clark for the plaintiff. The only question is whether the Emperor is still entitled to recover the money or whether anything has happened which could have divested him of his cause of action. The sovereign is the proper person to sue for public moneys in a foreign state. The fact that some one else may claim the money is immaterial. An order of the English Court is a perfect protection. There is no direct authority on the point, but it has been considered in the text-books. See Phillimore's International Law, vol. iii., pp. 826, 828.

The Emperor is absolute and the money vests in him absolutely and beneficially. He voluntarily gave his country a constitution and by that constitution he gave himself unlimited power.

[He referred to *United States of America* v. *Wagner* (1) and *Banco de Vizcaya* v. *Don Alfonso de Borbon y Austria.* (2)]

H. Wynn Parry K.C. and *H. G. Robertson* for the defendant company. The defendants do not ask the Court to decide who is entitled to be paid. To decide that there is a defect in the title of the plaintiff is not the same thing. The defendants wish to avoid making a payment to the wrong person.

Owing to the change in the situation since the date of the contract the plaintiff no longer has sufficient title to enable him to claim the money. [They referred to *Duff Development Co., Ld.* v. *Kelantan Government* (3) and *Bank of Ethiopia* v. *National Bank of Egypt and Liguori.* (4)]

The money is due to the representative of the sovereign power of Ethiopia, on the ground that it is a public right enjoyed by the state.

The Emperor remains de jure sovereign of Ethiopia but is no longer sovereign de facto. If he were, it would not be

(1) (1867) L. R. 2 Ch. 582.
(2) [1935] 1 K. B. 140.
(3) [1924] A. C. 797.
(4) [1937] Ch. 513.

his executors who could sue but his successors in office. See *United States of America* v. *McRae* (1); *Aksionairnoye Obschestvo A. M. Luther* v. *James Sagor & Co.* (2)

The right of the plaintiff, who is suing as a corporation sole, to do so was suspended by the recognition by the British Government that the Italian Government was the de facto Government in Ethiopia. The plaintiff is an individual representing for the time being a corporation sole. See Halsbury's Laws of England, vol. viii., p. 305.

The defendants challenge nothing more than the question of title.

Andrew Clark in reply. The plaintiff sues as an individual, and it is immaterial whether he is to be treated as a corporation sole or an individual. [He referred to *United States of America* v. *Wagner.* (3)]

The Emperor was entitled to maintain an embassy in this country for the benefit of his people, and he exercised that right. It would be fantastic to suggest that he could not exercise the necessary right of suing for debts for the purpose of maintaining the embassy. This is a debt vested wholly in the plaintiff and nothing has been done to divest it. The case is distinguishable from *Bank of Ethiopia* v. *National Bank of Egypt and Liguori* (4), as in that case Clauson J. was not considering extra-territorial property. No distinction is drawn in the Courts of this country between the public debts and the private debts of the sovereign, so long as he remains the sovereign. If the plaintiff had abdicated, the whole question would have been dealt with in the deed of abdication.

[On the question of authority to bring the action he referred to *Richmond* v. *Branson & Son* (5) and *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse.* (6)]

BENNETT J. [after stating the facts, continued:] The defendants have always been and still are ready and willing

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(1) (1869) L. R. 8 Eq. 69.
(2) [1921] 3 K. B. 532.
(3) L. R. 2 Ch. 582.
(4) [1937] Ch. 513.
(5) [1914] 1 Ch. 968.
(6) [1925] A. C. 112.

C. A.
1938
HAILE SELASSIE v. CABLE AND WIRELESS, LD. (No. 2).
Bennett J.

to pay the sum which they owe, to any one who is entitled to receive it, but a claim has been made to it on behalf of H.M. the King of Italy. I will read the letters which have passed between the defendants and the Italian Embassy in London with reference to the matter. [After reading the letters, in which a claim to the money was made on behalf of His Majesty the King of Italy and from which it appeared that the Italian Government was unwilling to submit to the jurisdiction of the English Courts in this matter, his Lordship continued :] These letters make it plain to a lawyer that the defendants were and are placed in a difficult situation.

Since the Italian Government are a foreign sovereign authority they cannot be brought before an English Court by interpleader proceedings.

The defendants have to choose between paying the plaintiff and running the risk of the Italian Government hereafter establishing that the money is owing to them, or resisting the plaintiff's claim in these proceedings by setting up by way of defence the title of the Italian Government to the money the plaintiff seeks to recover.

They have elected to take the latter course and have resisted the plaintiff's claim on the grounds pleaded in paras. 3a and 3b of their amended defence. I will read these pleas :—

" 3a. His Majesty Haile Selassie left Addis Ababa and his "former Empire of Ethiopia on or about the 1st May, 1936, "and has never since returned thereto by reason of the "conquest thereof by the military forces of the King of Italy. ". . . . On or about the 9th May, 1936, the King of Italy "and the Italian Government by proclamation annexed the "said Empire of Ethiopia and since the said date have been "or become and now are the Sovereign Head and Government "thereof and in control thereof. By reason of the premises "the alleged cause of action of His Majesty Haile Selassie "has passed to and become vested in the King of Italy and "the Italian Government.

"3b. Under the constitution of Ethiopia the sovereign "power over the Empire of Ethiopia and all public rights "appertaining thereto were vested in the Emperor of Ethiopia "as a corporation sole or alternatively in the natural person "who is for the time being the Emperor of Ethiopia. The "claim in this action is in respect of a public right appertaining "to the Sovereign power of the Empire of Ethiopia and was "by virtue of the recognition in December, 1936, by His "Majesty's Government of the Government of Italy as the "de facto Government of Ethiopia suspended or alternatively "transferred to the King of Italy as the Sovereign Head of the "Italian Government."

At the trial Mr. Parry for the defendants relied almost if not entirely upon the second of the two pleas.

The question to be decided may I think be stated in these words. Does the fact that the Italian Government has been and is recognized by the British Government as the de facto government of Ethiopia vest in the Italian Government the right to sue for and obtain judgment in an English Court for a debt formerly due to and recoverable by the plaintiff as the sovereign authority of Ethiopia, the debt being due to the plaintiff as Emperor of Ethiopia and the British Government recognizing the plaintiff as the de jure Emperor of Ethiopia ?

The defendants contended that the question was settled in their favour by authority and they relied on three reported cases.

The first was the *United States of America* v. *McRae* (1), a decision of James V.-C. In that case the suit arose out of a transaction entered into during the war between North and South in the United States of America, a war which broke out in the year 1861. The suit was started by a bill in equity issued, after the war was terminated, by the United States of America, suing as plaintiffs against the defendants.

The facts were that a rebellious government calling itself the government of the confederate states had been established in the southern part of the United States of America.

For this government the defendant had acted as agent in Liverpool and in that capacity he had received contributions from subscribers to a loan to this government.

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(1) L. R. 8 Eq. 69.

The purpose of the action was to make the defendant liable for all the contributions he had received. The United States of America had repudiated all liability to repay the moneys borrowed by the government of the confederate state. The bill was filed at a time when the plaintiffs ruled throughout the territory of the United States of America and when the confederate government had no longer any existence.

The question discussed was what was the footing on which the defendant was liable to account.

The Vice-Chancellor was willing to order an account to be taken as it would be taken between the government of the confederate states on the one hand and the defendant as agent for such government on the other, on the plaintiffs submitting to pay what on the footing of that account might be found due from them.

The plaintiffs refused to take an order for an account on this footing and the Vice-Chancellor dismissed the bill. The purport of his judgment was to establish that the plaintiffs' rights against the defendant were as successors to the government of the confederate states and that they could only have an account on that footing. The defendants rely on a passage in the Vice-Chancellor's judgment. (1) They say it states a proposition of English law which rules the present case in their favour. The passage is as follows: "I apprehend it to be the clear public universal law that any "government which de facto succeeds to any other govern-"ment, whether by revolution or restoration, conquest or "reconquest, succeeds to all the public property, to everything "in the nature of public property, and to all rights in respect "of the public property of the displaced power, whatever "may be the nature or origin of the title of such displaced "power. Any such public money in any treasury, any such "public property found in any warehouses, forts, or arsenals, "would, on the success of the new or restored power, vest "ipso facto in such power; and it would have the right to call "to account any fiscal or other agent, or any debtor or "accountant to or of the persons who had exercised and had

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(1) L. R. 8 Eq. at p. 75.

"ceased to exercise the authority of a government, the agent, "debtor, or accountant having been the agent, debtor, or "accountant of such persons in their character or pretended "character of a government."

I agree that the passage does contain a statement which, if it be a statement of the law of England applicable to the facts of the present case, would be an authority which would bind me to decide the case in the defendants' favour.

But is it such an authority? I desire to refer to Lord Halsbury's speech in *Quinn* v. *Leathem* (1) and to read a passage from it (2): "there are two observations of a "general character which I wish to make, and one is to repeat "what I have very often said before, that every judgment "must be read as applicable to the particular facts proved, "or assumed to be proved, since the generality of the "expressions which may be found there are not intended to be "expositions of the whole law, but governed and qualified "by the particular facts of the case in which such expressions "are to be found. The other is that a case is only an authority "for what it actually decides."

In *United States of America* v. *McRae* (3) the Vice-Chancellor was not considering which of two claimants, one being a de jure sovereign and the other a de facto sovereign, was entitled to recover property in the jurisdiction of this Court, the title to which had at one time been vested in the de jure sovereign. No such question was in issue or discussed. No such question could or did arise for discussion or decision.

In these circumstances, having in mind Lord Halsbury's words, I cannot regard the passage in question as an authority on the question which arises for decision in the present action.

The next case relied on was *Luther* v. *James Sagor & Co.* (4), a decision of the Court of Appeal.

I think the only point established by the decision in that case is that when the Government of this country has recognized that some foreign government is de facto governing some foreign territory, the law of England will regard the acts

(1) [1901] A. C. 495.
(2) Ibid. at p. 506.
(3) L. R. 8 Eq. 69.
(4) [1921] 3 K. B. 532.

of the de facto government in that territory as valid and treat them with all the respect due to the acts of a duly recognized foreign sovereign state. It is clear I think that the acts so treated are acts in relation to persons or property in the territory which the authority is recognized as governing in fact. It was not suggested in that case nor was anything said in it which supports the view that on or in consequence of such recognition a title to property in this country vests in the de facto government and that a title vested in a displaced government is divested.

In my judgment *Luther* v. *James Sagor & Co.* (1) is not an authority which supports the defendants' pleas.

The last case cited is of importance, because it is concerned with the Italian conquest of Ethiopia and the recognition of the Italian Government as the de facto government of Ethiopia. It is the *Bank of Ethiopia* v. *National Bank of Egypt and Liguori* (2), and it was decided by Clauson J.

The question to be decided in that case was whether the Bank of Ethiopia, a company incorporated by Ethiopian law, had been dissolved or had otherwise ceased to exist by force of a decree promulgated in Ethiopia by the Italian Government, when governing that country de facto.

Clauson J., following and applying *Luther* v. *James Sagor & Co.* (3), held that the bank was dissolved by the decree.

It had been suggested in argument on behalf of the Bank of Ethiopia that there was some limitation on the sovereignty of the de facto government arising out of the recognition of His Majesty Haile Selassie as the de jure sovereign of Ethiopia, and in disposing of that argument the learned judge used the following language (4) :—

"It was then sought, as I understood, to argue that the "recognition of some measure of sovereignty de jure in the "fugitive Emperor logically led to the denial of full sovereignty "to the de facto government : and it was, as I understood, "suggested that there existed this limitation on the acts of "the de facto government which are to be recognized as

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(1) [1921] 3 K. B. 532.
(2) [1937] Ch. 513.
(3) [1921] 3 K. B. 532.
(4) [1937] Ch. 522.

"internationally valid, that they must be acts which are "strictly necessary for preserving peace, order and good "government within the area controlled by the de facto "government. This seems to me to be entirely inconsistent "with the authorities to which I have already referred, and "in principle to be fallacious. The recognition of the fugitive "Emperor as a de jure monarch, appears to me to mean "nothing but this, that while the recognized de facto "government must for all purposes, while continuing to "occupy its de facto position, be treated as a duly recognized "foreign sovereign state, His Majesty's government recognizes "that the de jure monarch has some right (not in fact at the "moment enforceable) to reclaim the governmental control "of which he has in fact been deprived. Where, however, "His Majesty's government has recognized a de facto government, there is, as it appears to me, no ground for suggesting "that the de jure monarch's theoretical rights (for ex "hypothesi he has no practical power of enforcing them) can be "taken into account in any way in any of His Majesty's Courts."

On this passage the defendants based an argument to the effect that the plaintiff has no enforceable rights as sovereign de jure so long as there is another government recognized as the de facto government of the country of which he is recognized as the sovereign de jure, and that, since the money sought to be recovered in this action is public money, belonging to the state of Ethiopia, the plaintiff cannot recover it, but that the Italian Government can do so.

In my judgment the passage relied on by the defendants is no authority whatever for the proposition for which it is sought to use it, and the last sentence of the passage which I have read from the judgment shows that it is not such an authority.

The learned judge was concerned to demonstrate that the plaintiff had no governmental control of any kind in Ethiopia, and gives as his reason that he had no means of enforcing control there. He was not considering or deciding questions of title to property in this country, where, if the plaintiff has a title, that title can be enforced.

C. A.
1938
HAILE SELASSIE v. CABLE AND WIRELESS, LD. (No. 2).
Bennett J.

Both *Luther* v. *James Sagor & Co.* (1) and the *Bank of Ethiopia* v. *National Bank of Egypt and Liguori* (2) were considered by the Court of Appeal in the recent case of *Banco de Bilbao* v. *Sancha.* (3)

The judgment of the Court was delivered by Clauson L.J., and he summarizes the principles laid down in them in the following terms (3): "This Court is bound to treat the "acts of the government which His Majesty's Government "recognize as the de facto government of the area in question "as acts which cannot be impugned as the acts of an "usurping government, and conversely the Court must be "bound to treat the acts of a rival government claiming "jurisdiction over the same area, even if the latter government "be recognized by His Majesty's Government as the de jure "government of the area, as a mere nullity, and as matters "which cannot be taken into account in any way in any of "His Majesty's Courts."

This passage seems to me to make it plain that what has been decided in *Luther* v. *James Sagor & Co.* (1) and the *Bank of Ethiopia* v. *National Bank of Egypt and Liguori* (2) has reference exclusively to the acts of a de facto government and a de jure government, both recognized as such by His Majesty's Government and both claiming to have jurisdiction in the same area with reference to persons and property in that area.

The principle is that the Courts of this country will recognize and give effect to the acts of the former in relation to persons and property in the governed territory and will disregard and treat as a nullity the acts of the latter.

The present case is not concerned with the validity of acts in relation to persons or property in Ethiopia. It is concerned with the title to a chose in action—a debt, recoverable in England.

Having considered all the cases cited to me in argument, I have come to the conclusion that the point is not covered by English judicial authority.

I have to decide whether it is the law of England that the

(1) [1921] 3 K. B. 532.
(2) [1937] Ch. 513.
(3) [1938] 2 K. B. 176, 195.

plaintiff, recognized by His Majesty's Government as the Emperor de jure of Ethiopia, has lost the right to recover the debt in a suit in this country, because the country in which he once ruled has been conquered by Italian arms and because His Majesty's Government recognizes that that country or the greater part of it is now ruled by the Italian Government.

It is unfortunate, I think, that the question has to be decided by a judge, for, in deciding it, it is impossible to avoid deciding on a claim made by a foreign sovereign state not a party to the proceedings. For this reason I shall say as little as possible.

My judgment is in favour of the plaintiff.

I will first read a passage from the judgment of Lord Cairns in *United States of America* v. *Wagner*. (1) The passage is as follows: "It was contended then, that when a "monarch sues in our Courts, he sues as the representative of the state of which he is the sovereign; that the "property claimed is looked upon as the property of the "people or state; and that he is permitted to sue, not as for "his own property, but as the head of the executive government of the state to which the property belongs; and it "was contended, in like manner, that when the property "belongs to a republic, the head of the executive, or in other "words the President, ought to sue for it.

"This argument, in my opinion, is founded on a fallacy. "The sovereign, in a monarchical form of government, may, "as between himself and his subjects, be a trustee for the latter, "more or less limited in his powers over the property which "he seeks to recover. But in the Courts of Her Majesty, as "in diplomatic intercourse with the government of Her "Majesty, it is the sovereign, and not the state, or the subjects "of the sovereign, that is recognized. From him, and as "representing him individually, and not his state or kingdom, "is an ambassador received. In him individually, and not "in a representative capacity, is the public property assumed "by all other states, and by the Courts of other states, to be "vested. In a republic, on the other hand, the sovereign

(1) L. R. 2 Ch. 582, 593.

C. A.
1938
Haile Selassie v. Cable and Wireless, Ld. (No. 2)
Bennett J.

"power, and with it the public property, is held to remain "and to reside in the state itself, and not in any officer of the "state. It is from the state that an ambassador is accredited, "and it is with the state that the diplomatic intercourse is "conducted."

I regard this statement as authority for the proposition that when the liability to pay the debt in the suit arose, the right to sue for it and to recover it was vested in the plaintiff.

I ask myself why should the fact that the Italian army has conquered Ethiopia and that the Italian Government now rules Ethiopia divest the plaintiff of his right to sue.

The only reason can be, I suppose, that the money is not the plaintiff's own money, and that it is a sum which he is under some obligation to spend for the benefit of the people of Ethiopia—an obligation which he cannot now fulfil.

There is a clear answer to this suggestion. I think it undesirable that I should state it.

I hold that nothing has happened to divest the title formerly vested in him and that he is entitled to judgment for the sum agreed between the parties as the sum due from the defendants on January 1, 1936.

J. L. D.

C. A.

The defendants appealed.

On the matter coming before the Court of Appeal on November 3, 1938, the attention of the Court was called to the fact that, on the day before, an announcement had been made by the Prime Minister in the House of Commons that it was the intention of His Majesty's Government in a very short time to recognize the King of Italy as de jure Emperor of Abyssinia. In those circumstances the Court adjourned the proceedings until such recognition had in fact taken place. The appellants' solicitors had since received a certificate signed by the direction of the Secretary of State for Foreign Affairs, stating that His Majesty's Government no longer recognized the respondent as de jure Emperor of

C. A.
1938

Haile Selassie
v.
Cable and Wireless, Ld. (No. 2).

Ethiopia, but now recognized the King of Italy as such. The matter came again before the Court of Appeal on December 6, when *Andrew Clark* for the respondent said that, in view of the retrospective effect of the de jure recognition, he could no longer contend that the claim could be enforced.

Sir Wilfrid Greene M.R. This is an appeal from a judgment of Bennett J. in an action by the late Emperor of Abyssinia against Cable and Wireless Limited. The claim in the action was for an account of all dealings between the plaintiff and the defendant company under a certain agreement, and payment of the amount found due. The agreement in question was an agreement between the competent Minister of the then Government of Ethiopia and the defendant company in relation to the establishment of a wireless station at Addis Ababa, the capital city of Abyssinia. Under that agreement certain sums admittedly became due from the defendant company. The dispute between the parties turned on the fact that the defendants asserted that the plaintiff had no title to sue for those moneys. Bennett J. decided in favour of the plaintiff. At the date of the trial the evidence available which was before the learned Judge, so far as it relates to the essential question raised in this appeal, showed that the annexation of Ethiopia by His Majesty the King of Italy had not yet been recognized by His Majesty's Government, but that His Majesty's Government recognized the plaintiff as the de jure Emperor of Ethiopia, and that His Majesty's Government recognized the Italian Government as the Government de facto of virtually the whole of Ethiopia, and such recognition had existed since the second half of December, 1936, that is to say, since a date earlier than the date of the issue of the writ, which was issued on January 4, 1937. Bennett J. held that the events which had taken place in Ethiopia and the other matters which were established before him were not sufficient to divest the plaintiff as still de jure Emperor of Ethiopia, of the right to recover the debt in suit in this country. From that judgment this appeal is brought. The appeal stood in the list for hearing on November 3 last, and it was called

C. A.
1938

HAILE SELASSIE
v.
CABLE AND WIRELESS, LD. (No. 2).

Sir Wilfrid Greene M.R.

to our attention by Mr. Wynn Parry that, on the day before, an announcement had been made by the Prime Minister in the House of Commons from which it appeared that in the course of a few days, or at any rate a very short time, it was the intention of His Majesty's Government to recognize His Majesty the King of Italy as Emperor of Abyssinia, that is to say, that his position would be recognized de jure and no longer merely de facto. It was obvious from that announcement that, if it were carried into effect, the situation of this action would be profoundly affected, because circumstances would then be brought to the knowledge of the Court which would have a very important bearing upon the position of the plaintiff and his rights in respect of the debt in question in the action. Accordingly we thought right to adjourn the hearing of the appeal until a date after the probable date of recognition. We did so for this reason. If we had heard the appeal then, and if we had decided in favour of the respondent, it was clearly a matter which would have been proper for consideration by the House of Lords, and therefore one in which, if we had been asked, we should have granted leave to appeal to that House. We further had to bear in mind that the defendants were deprived of the right a defendant ordinarily has of interpleading, owing to the circumstance that the other possible claimant to this money was a foreign Sovereign State. In those circumstances, had we heard the appeal, and let me assume that we had dismissed it, the litigation would have been carried to the House of Lords, and we should have felt bound for the purpose of doing justice to grant a stay of execution. The result of that merely would have been that, recognition having taken place in the meanwhile, the appeal would have come before the House of Lords with the new fact having taken place which now has taken place, and the House of Lords would have been in precisely the same position then as this Court is now in relation to that new fact to which I shall refer in a moment. In those circumstances it was obviously most conducive to the ends of justice that the position should be preserved and that those matters should be dealt

C. A.
1938
HAILE SELASSIE
v.
CABLE AND WIRELESS, LD. (No. 2).

Sir Wilfrid Greene M.R.

with in this Court without the necessity of further litigation. Events have proved that that decision was a right and just one.

What has happened is this. As appears from a certificate signed by the direction of His Majesty's Principal Secretary of State for Foreign Affairs, dated November 30, 1938, His Majesty's Government no longer recognizes His Majesty Haile Selassie as de jure Emperor of Ethiopia; His Majesty's Government now recognizes His Majesty the King of Italy as de jure Emperor of Ethiopia. From that certificate two things emerge as the result of the recognition thereby evidenced. It is not disputed that in the Courts of this country His Majesty the King of Italy as Emperor of Abyssinia is entitled by succession to the public property of the State of Abyssinia, and the late Emperor of Abyssinia's title thereto is no longer recognized as existent. Further, it is not disputed that that right of succession is to be dated back at any rate to the date when the de facto recognition, recognition of the King of Italy as the de facto Sovereign of Abyssinia, took place. That was in December, 1936. Accordingly the appeal comes before us upon a footing quite different to that upon which the action stood when it was before Bennett J. We now have the position that in the eye of the law of this country the right to sue in respect of what was held by Bennett J. to be (and no dispute is raised with regard to it) part of the public State property, must be treated in the Courts of this country as having become vested in His Majesty the King of Italy as from a date, at the latest, in December, 1936, that is to say, before the date of the issue of the writ in this action. Now that being so, the title of the plaintiff to sue is necessarily displaced. When the matter was before Bennett J., the de jure recognition not having taken place, the question that he had to deal with was whether the effect of the de facto conquest of Abyssinia and the recognition de facto of the Italian Government's position in Abyssinia, operated to divest the plaintiff of his title to sue. Whether that decision was right or whether it was wrong is a question we are not called upon to answer, but what is admittedly the case is that if Bennett J. had had before him the state of affairs which we have before us, his decision would have been the other way.

Now that being so, the only course which this Court can take is to allow the appeal and dismiss the action, but the question arises as to costs. On the one hand, of course, it was open to the respondents to claim that, in so far as Bennett J.'s judgment was not displaced on the facts as they were before him, he was entitled to keep his order as to the costs of the action. With regard to the costs of the appeal this position might have arisen. It might have been thought worth one side's or the other's while to argue this appeal on the merits in order to ascertain whether or not at the date when Bennett J. delivered his judgment and on the evidence then before him, the decision to which he came was the right one. That being the position, counsel for both parties have taken what, in my view, is a very proper course and in the interests of their clients a very wise course, because neither counsel feels that he would be justified in asking this Court to hear the appeal on the merits with a view to coming to a decision on the matter of costs, which on the one hand would, or might, deprive the plaintiff of the order for costs below which he already holds, and on the other hand might involve the appellants in paying the costs of this appeal or, on the other hand, involve the respondent in the risk of paying the costs of this appeal. In those circumstances, neither counsel wishes to argue against an order to this effect, that so far as costs are concerned the order as to costs below is to stand and that there should be no costs of this appeal, and as I say, I think that counsel for both parties have very wisely advised their clients to take that course. Mr. Andrew Clark, appearing for the plaintiff in the action, if I may be permitted to say so, took a perfectly proper course, and indeed the only course that was open to him in not attempting to argue before this Court what would have been a hopeless proposition, namely, that the effect of the de jure recognition of His Majesty the King of Italy as Emperor of Abyssinia has not been to divest his client, the late Emperor Haile Selassie, of his title to sue.

That being so, the order of the Court will be that the appeal be allowed, that the action be dismissed, but that the order as to costs made by Bennett J. shall not be disturbed, and there will be no costs of the appeal.

SCOTT L.J.: I agree.

CLAUSON L.J.: I agree.

Appeal allowed.

Solicitors: *Wordsworth, Marr Johnson & Shaw; Bircham & Co.*

P. J. B.

CLAUSON L.J.

1938

Oct. 27.

In re BERTON.

VANDYK *v.* BERTON.

[1938. B. 2225.]

Administration—Tenant for life and remainderman—Wasting property—Leaseholds—No trust for sale and conversion in will—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 28, *sub-s.* 2; *s.* 35.

By his will a testator, who died in 1937, directed his trustees to pay two-thirds of the income of his real and personal estate to his wife during her life and the remaining third in equal parts to his son and daughter. Subject to the life interest of his wife, he bequeathed to his son and daughter the whole of the income in equal parts, directing that at their death the income to which he or she might be entitled should be equally divided between their respective children. There was no trust for sale and conversion. The estate consisted largely of long leaseholds:—

Held, (1.) that, though a trust for sale and conversion was not contained in the will, but was imported by virtue of the Law of Property Act, 1925, the effect of s. 28, sub-s. 2, of that Act was that the rule in *Howe* v. *Earl of Dartmouth* (1802) 7 Ves. 137 was not applicable and s. 35 did not operate to preserve it.

(2.) that, accordingly, the trustees held the leasehold properties on trust for sale with power to postpone sale for an indefinite period.

In re Brooker. Brooker v. *Brooker* [1926] W. N. 93 followed.

S.L.A. 536

ADJOURNED SUMMONS.

The testator, Arthur Berton, who died on October 14, 1937, by his will dated June 16, 1930, made the following disposition: "Subject to the life interest of my wife as "hereafter mentioned I bequeath the whole of the income of "my real and personal estate in equal parts to my son Herbert "Berton and my daughter Constance Vandyk and at their "death the income to which he or she would have been entitled "to shall then be equally divided between their respective "children. At my death my trustees shall pay two thirds "of the income of my real and personal estate to my wife "during her life and the remaining third of the income in "equal parts to my son Herbert Berton and my daughter "Constance Vandyk." The estate of the testator at his death was of the gross value of about 48,000*l*. It included long leaseholds to the value of about 35,000*l.* There survived the testator his wife, Martha Berton, and also his son, Herbert Berton, and his daughter, Constance Vandyk, both of whom had infant children.

There being no trust for sale and conversion in the will, the executors by a summons taken out on June 1, 1938, asked (inter alia) whether they should within one year of the testator's death sell his leasehold properties and reinvest the proceeds of sale in trustee securities or whether they should hold them upon trust for sale with power to postpone sale for an indefinite period.

Andrew Clark for the plaintiffs.

T. A. C. Burgess for the testator's widow and daughter. In this case there is a bequest of the income "to two or more persons "in undivided shares" within the meaning of s. 34, sub-s. 3, of the Law of Property Act, 1925. (1) This operates as a gift to the trustees upon the statutory trusts: *In re House. Westminster Bank* v. *Everett.* (2) The property is accordingly held on trust for sale with power to postpone sale: ss. 25, 35. Under s. 28, sub-s. 2, there must be read into the will a provision that the net rents and profits of the leaseholds till sale are to be applied "in like manner as the income of investments representing the purchase money would be payable or applicable if "a sale had been made and the proceeds had been duly invested." The effect is that the rule in *Howe* v. *Earl of Dartmouth* (1) no longer applies: *In re Brooker. Brooker* v. *Brooker.* (2) The only difference between that case and the present is that there was there a specific trust for sale in the will, while here the trust for sale arises under the Act. That difference is not material. Accordingly, these leaseholds, which come within the definition of "land" in s. 205, sub-s. 1 (ix.), are held upon trust for sale with power to postpone sale for an indefinite period.

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(1) By the Law of Property Act, s. 28, sub-s. 2: "Subject to any "direction to the contrary in the "disposition on trust for sale or "in the settlement of the proceeds "of sale, the net rents and profits "of the land until sale, after keeping down cost of repairs and "insurance and other outgoings "shall be paid or applied, except "so far as any part thereof may "be liable to be set aside as "capital money under the Settled "Land Act, 1925, in like manner "as the income of investments "representing the purchase money "would be payable or applicable "if a sale had been made and "the proceeds had been duly "invested."

By s. 35: "For the purposes of "this Act land held upon the "'statutory trusts' shall be held "upon the trusts and subject to "the provisions following, namely, "upon trust to sell the same and "to stand possessed of the net "proceeds of sale, after payment "of costs, and of the net rents and "profits until sale after payment "of rates, taxes, costs of insurance, "repairs, and other outgoings, upon "such trusts, and subject to such "powers and provisions, as may "be requisite for giving effect to "the rights of the persons (including an incumbrancer of a former "undivided share or whose incumbrance is not secured by a legal "mortgage) interested in the "land."

(2) [1929] 2 Ch. 166.

Richard Wilberforce for the infant children of the testator's son and daughter. In such a case as this, before the new legislation, the trustees would have been obliged to convert the leaseholds unless the will showed that specific enjoyment by the tenant for life was intended. Here no such intention appears. That was the rule in *Howe* v. *Earl of Dartmouth* (1), and it applies to the present case. *In re Brooker* (2) is distinguishable because there the trust for sale was expressed in the will. The provisions of s. 28, sub-s. 2, are expressed to be "subject to "any direction to the contrary." Those words take the present case out of the sub-section. Further, s. 35 expressly preserves "the rights of the persons . . . . interested in the land," thus saving the rights as between tenant for life and remainderman. Those rights include their rights under the rule in *Howe* v. *Earl of Dartmouth.* (1) Accordingly, the leaseholds should be sold within a year of the testator's death and the proceeds of sale invested.

CLAUSON L.J. The testator by his will bequeathed the whole of the income of his real and personal estate, subject to the life interest of his wife, in equal parts to his son and his daughter, directing that on their death the income to which he or she might be entitled was to be equally divided among their respective children. It will be observed that there is in the will no trust to convert, and the fact is that a considerable part of that which forms the subject-matter of the gift is long leaseholds.

(1) 7 Ves. 137. (2) [1926] W. N. 93.

CLAUSON L.J.

1938

BERTON, *In re.* VANDYK *v.* BERTON.

It is suggested, and no doubt correctly, that if before January 1, 1926, when the Law of Property Act, 1925, came into force the matter had arisen for decision, the trustees ought, in the administration of the estate, having regard to the decision in *Howe* v. *Earl of Dartmouth* (1), to have converted the long leaseholds, unless it appeared from the will (and it is contended that it does not so appear) that specific enjoyment by the tenant for life was intended. However, the will was made and the testator died after the new legislation had come into force. Now, since that Act it has been decided by Lawrence J. in *In re Brooker* (2), a case which is binding upon me, and the correctness of which nobody has questioned, that where there is in a will a trust to convert with a power to postpone, and a part of the residue to which that trust relates consists of leaseholds, then in view of the fact that leaseholds come within the term "land" in the new legislation, and in view of the provisions of s. 28, sub-s. 2, of the Law of Property Act, 1925, as to the way in which rents and profits until sale are to be applied, that is to say, "in like manner as the income "of investments representing the purchase money would be "payable or applicable if a sale had been made," the rule in *Howe* v. *Earl of Dartmouth* (1) must be treated as no longer applicable. That was a case in which the will contained, in express terms, a trust for sale and a power to postpone. Now, the gift in the present case is for certain persons to share the income of the estate, and it has been held by authorities which are binding on me, and which nobody has sought to question, that by reason of s. 34, sub-s. 3, such a gift operates as a gift to trustees upon the statutory trusts, that is to say, as one finds on turning to s. 35, "upon trust to sell the same and to stand "possessed of the net proceeds of sale, after payment of costs, "and of the net rents and profits until sale" after payment of certain outgoings, "upon such trusts, and subject to such powers "and provisions, as may be requisite for giving effect to the "rights of the persons . . . . interested in the land." Accordingly, I have to read this will as if it contained a provision creating a trust in those words, so far as relates to the

(1) 7 Ves. 137.

(2) [1926] W. N. 93.

CLAUSON L.J.
1938
BERTON, *In re.*
VANDYK *v.* BERTON.

leaseholds. But further, in view of s. 25, I have to read in a power to postpone the sale and, having regard to s. 28, sub-s. 2, I have also to read in a provision that the net rents and profits of the leaseholds until sale are to be applied "in like manner as the "income of investments representing the purchase money" payable if a sale had been made. Reading all those provisions together, it appears to me that I am bound to treat this case as being on all fours with the decision in *In re Brooker* (1), and to hold that the circumstance that in the present case the trust for sale is read in by virtue of the Act does not differentiate it from that case where the trust for sale and the power to postpone were found expressly stated in the will.

The argument to the contrary is that under s. 35, which provides, in effect, that I am to read in to the will a trust to sell and to stand possessed of the net proceeds of sale and the net rents and profits until sale upon such trusts as may be requisite for giving effect to the rights of the persons interested, I must treat the rights of the persons interested as ipso facto involving a right in the remaindermen to claim that the rule in *Howe* v. *Earl of Dartmouth* (2) should be applied. I cannot for myself see that those words justify any such contention. In my view I should be drawing too fine a distinction if, basing myself on that suggestion, I were to differentiate a case where a trust for sale is expressed in the will and a case where the trust for sale has to be read into the will by virtue of the provisions of the Act. Accordingly on this point the declaration will be that by virtue of the provisions of ss. 25, 28 and 34 of the Law of Property Act, 1925, the plaintiffs hold the testator's leasehold properties upon trust for sale, with power to postpone sale for an indefinite period.

Solicitor: *Herbert Oppenheimer.*

F. H. C.

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(1) [1926] W. N. 93.

(2) 7 Ves. 137.

In re JEFFERYS.

FINCH *v.* MARTIN.

[1936. J. 378.]

FARWELL J.

1938
Oct. 19.

Will—Settlement—Life annuity secured on real and leasehold property—Direction to accumulate surplus income—Gift of accumulations on death of annuitant—Power of sale with consent of annuitant—Death of testator before 1926—*End of period of accumulations after* 1926—*Destination of income of accumulations—Settled Land Act,* 1925 (15 *Geo.* 5, *c.* 18), *ss.* 5, 13; *s.* 23, *sub-s.* 1; *ss.* 75, 108, 109 —*Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *s.* 164.

A testator, who died in 1912, bequeathed his real estate and the residue of his personal estate to trustees in trust to pay out of the income thereof a life annuity of 150*l.* to G. M., after whose death they were to hold the property in trust for sale and to hold the proceeds of sale together with the accumulations of surplus income in trust to divide the same among certain hospitals. He also authorized the trustees, with the consent of G. M. during his life, to sell the real and leasehold property and to stand possessed of the proceeds upon the trusts therein declared of the net proceeds of sale of his residuary real and personal estate after the death of G. M. After 1925 certain sales were made with that consent. No vesting deed under the Settled Land Act, 1925, had been executed. In 1933, G. M. being still living, the period within which the accumulation of surplus income was permitted by s. 164 of the Law of Property Act, 1925, expired:—

Held, (1.) that, there being no tenant for life, the trustees were statutory owners with the powers of a tenant for life by virtue of the Settled Land Act, 1925, s. 23, sub-s. 1; (2.) that s. 108, sub-s. 1, of the Act preserved powers exercisable by trustees with the consent only of a tenant for life and not of a person other than a tenant for life and that, accordingly, the power here in question was not thereby preserved; (3.) that the provisions of the settlement giving the trustees a power of sale with the consent of G. M. were in conflict with the provisions of the Act giving them a power of sale without obtaining any such consent, and that, accordingly, by virtue of s. 108, sub-s. 2, the provisions of the Act prevailed; (4.) that as from January 1, 1926, the only power of sale vested in the trustees was that conferred by the Act and the effect of the exercise of that power was that the proceeds of sale were to be treated as capital moneys and to be subject to the same trusts as the land; (5.) that, accordingly, the income of the proceeds of sale and of the accumulations was, as from the expiration of the period of accumulations, undisposed of and should be dealt with as on an intestacy.

FARWELL J.
1938
JEFFERYS, *In re.*
FINCH *v.* MARTIN.

ADJOURNED SUMMONS.

The testator, Edward Jefferys, made his will on June 17, 1902, and died on June 15, 1912. By his will he directed his trustees to stand possessed of his real estate and the residue of his personal estate in trust out of the income thereof to pay George Alfred Martin the annual sum of 300*l.* By a codicil dated August 23, 1909, the amount of the annuity was reduced to 150*l.* The will proceeded: "And I declare that "my trustees shall stand possessed of my real and personal estate "from and after the death of the said George Alfred Martin "upon trust to sell the same and to stand possessed of the net "proceeds thereof and the balance of the income accumulated "during the lifetime of the said George Alfred Martin and the "interest thereof in trust to divide the same amongst such "of the London hospitals situate within the administrative "County of London as my trustees for the time being shall "in their absolute discretion select . . ." It was further provided as follows: "I also authorise my trustees at any "time or times with the consent in writing of the said George "Alfred Martin during his life, should in their discretion it be "found expedient so to do, to sell the whole or any part or "parts of my said real and leasehold property and to stand "possessed of the net proceeds of any such sale upon the trusts "and subject to the powers and provisions herein declared and "contained of and concerning the net proceeds of the sale of "my residuary real and personal estate after the death of the "said George Alfred Martin."

From the death of the testator, George Alfred Martin received his annuity. From time to time portions of the real estate and leaseholds were sold with his consent. No vesting deed under the Settled Land Act, 1925, had been executed. From June 15, 1933, by virtue of the provisions of s. 164 of the Law of Property Act, 1925, the power to accumulate the surplus income ceased.

On May 20, 1936, Clauson J. held, with regard to the proceeds of sale of property sold before the coming into force of the Settled Land Act, 1925, on January 1, 1926, that they should be divided forthwith among the hospitals indicated in the will. His lordship also held that as from June 16, 1933, till the death of George Alfred Martin, the surplus income of the real and personal estate after discharging the annuity devolved as on an intestacy.

The trustees now sought the determination of the Court on the question whether the proceeds of sale of the real estate sold between December 31, 1925, and June 16, 1933, and the accumulations of the income of those proceeds should be forthwith divided among the hospitals indicated in the will or should be retained by the trustees and the income thereof as from June 15, 1933, dealt with as on an intestacy. It was agreed that the persons entitled on an intestacy were the testator's heirs in gavelkind.

Rink for the plaintiffs.

J. A. Reid for persons taking on an intestacy. The income of the proceeds of sale and accumulations is undisposed of. From January 1, 1926, when the property legislation of 1925 came into force, the only power of sale vested in the trustees was the statutory power. The power of sale conferred by the will became defunct and was not preserved by s. 108, sub-s. 1, of the Settled Land Act, 1925 (1). The power thereby preserved was one exercisable by a tenant for life or "by trustees with "his consent or on his request or by his direction or otherwise." The words do not apply to a power exercisable with the consent of some person who is not a tenant for life. Here there is no tenant for life.

Further, the statutory power to sell without obtaining the consent of any person is in conflict with the power under the

(1) By the Settled Land Act, 1925, s. 108: " (1.) Nothing in this "Act shall take away, abridge, or "prejudicially affect any power "for the time being subsisting "under a settlement, or by statute "or otherwise, exercisable by a "tenant for life, or (save as hereafter provided) by trustees with "his consent, or on his request, "or by his direction, or otherwise, "and the powers given by this Act "are cumulative.

"(2.) In case of conflict between "the provisions of a settlement "and the provisions of this Act, "relative to any matter in respect "whereof the tenant for life or "statutory owner exercises or "contracts or intends to exercise "any power under this Act, the "provisions of this Act shall "prevail . . . ."

will which could only be exercised with the consent of the annuitant. Accordingly, by virtue of s. 108, sub-s. 2, of the Settled Land Act, 1925, the Act must prevail, and the only power exercisable is the statutory power: *Earl of Lonsdale* v. *Lowther.* (1) The power under the will could not be an additional or larger power: s. 5, sub-s. 1 (*d*); s. 109. The sales must be taken to have been made in a way in which they could properly be made.

Even if the power given by the will is still exercisable, this could not alter the destination of the proceeds of sale. *In re Flint. Flint* v. *Flint.* (2) In this case there has been no vesting deed and consequently the effect of the sales was that they operated only as contracts for sale: s. 13.

The effect of these transactions is that the proceeds of sale must be treated as capital moneys and subject to the trusts of the settlement: s. 75, sub-s. 5. Under those trusts the land was to be retained and the surplus income accumulated. Since any accumulation beyond 1933 is forbidden by law, that income, till the annuitant's death, must go as on an intestacy.

Herbert Hart for other persons taking on an intestacy, adopted this argument.

John Brunyate (*Andrewes Uthwatt* with him) for the Attorney-General. The hospitals, the residuary legatees, are entitled to take. The ambit of s. 108, sub-s. 1, which means what it says, is not confined to powers exercisable with the consent of a tenant for life. The words "or otherwise" have a general meaning and import a power exercisable by the trustees with the consent of other persons. Accordingly, the power in the present case is one which is not to be taken away, abridged or prejudicially affected.

The power under the will is quite different from the statutory power since one of the consequences of selling with the consent of the annuitant is to diminish his security. There is no conflict between these two powers. A sale under the will with the consent of the annuitant would not be improper under the Act. The two powers can co-exist without any inconsistency.

(1) [1900] 2 Ch. 687.

(2) [1927] 1 Ch. 570.

Under whichever power the sales may have been made, as between the beneficiaries this money should be treated as proceeds of sale and should go as such to the residuary legatees.

FARWELL J. [having stated the facts :] The purpose for which Mr. Martin's consent was thought necessary by the testator before any power of sale could be exercised is obvious. His object was quite clearly the protection of Mr. Martin. If the trustees sold and the proceeds of sale ceased to be part of his security, Mr. Martin might be prejudiced ; and the requirement of his consent to a sale was a reasonable and a proper arrangement. There have been sundry sales in the past with his consent ; presumably he has been content to allow certain portions of the property to go and to rely on the remaining property as representing sufficient security for the payment of his annuity.

No difficulty arose until June 15, 1933, but on that date, under the provisions of s. 164 of the Law of Property Act, 1925, the direction to accumulate determined. The question, therefore, arises as to the destination of the accumulations accrued from the property as from that date. The income from the property must, of course, first be applied in paying the annuity to Mr. Martin, but any surplus over and above that sum can no longer be accumulated. The question is how is the surplus income to be dealt with ; does it belong to the hospitals as the residuary legatees or is it undisposed of during the period between June 15, 1933, and the death of Mr. Martin, whenever that may be ? If the true view be that it is undisposed of, then the surplus income in this case goes to the heirs in gavelkind of the testator.

So long as a sale was made under the power which was contained in the will with the consent of Mr. Martin, the hospitals got the benefit of it and the proceeds of sale were treated as though Mr. Martin were dead ; but so far as any surplus income was concerned, if the trusts of the will had been carried out apart from s. 164 of the Law of Property Act, 1925, the result would have been that the income of the

FARWELL J.
1938
JEFFERYS, *In re.*
FINCH *v.* MARTIN.

unsold property would have been applied in the first instance in paying the annuity of Mr. Martin, and the whole of the remainder would have been accumulated during the rest of his life and ultimately would have become part of the residue of the estate. But the Act has prevented the accumulations continuing beyond 1933, and therefore this question arises.

It appears to me that the decision must turn very largely on the true construction to be put upon certain sections in the Settled Land Act, 1925. On January 1, 1926, that Act came into operation, and thereupon, there being no tenant for life under the settlement in the will, the property became vested in the trustees with all the powers of a tenant for life. Sect. 23 provides: "(1.) Where under a settlement there is no tenant "for life"—that is this case—"nor, independently of this " section, a person having by virtue of this Act the powers of "a tenant for life then—(*a*) any person of full age on whom "such powers are by the settlement expressed to be con-"ferred; and (*b*) in any other case the trustees of the settle-"ment; shall have the powers of a tenant for life under this "Act." Accordingly the trustees on and after January 1, 1926, were statutory owners with the powers of a tenant for life, and it became necessary by virtue of the Act that there should be a vesting deed vesting the land in them. Sect. 5, sub-s. 1, provides: "Every vesting deed for giving "effect to a settlement or for conveying settled land to a "tenant for life or statutory owner during the subsistence of "the settlement (in this Act referred to as a 'principal vesting "deed') shall contain the following statements and particulars, "namely:— . . . ." Then it is enacted that there should be a description of the settled land, a statement that the settled land is vested in the persons to whom it is conveyed and other matters, and under (*d*) it is required that there should be set out: "Any additional or larger powers conferred by the trust "instrument relating to the settled land which by virtue of "this Act operate and are exercisable as if conferred by this "Act on a tenant for life." Thus there should have been in this case a vesting deed which would have contained the particulars required by s. 5, including "Any additional or "larger powers conferred by the trust instrument" as provided by sub-cl. (*d*). In truth and in fact there never has been a vesting deed at all, but there have been several sales between January 1, 1926, and June 15, 1933. Those sales in every case, I think, were made or were purported to be made by the trustees with the consent of Mr. Martin, that is to say, they purported to be sales under the express power given to the trustees under the settlement.

In the absence of a vesting deed, which should have been in existence but was not, there arises the question how far the sales could operate as sales at all. By s. 13 it is provided: "Where a tenant for life or statutory owner has "become entitled to have a principal vesting deed or a vesting "assent executed in his favour, then until a vesting instrument is executed or made pursuant to this Act in respect "of the settled land, any purported disposition thereof inter "vivos by any person, other than a personal representative "(not being a disposition which he has power to make in right "of his equitable interests or powers under a trust instrument), "shall not take effect except in favour of a purchaser of a "legal estate without notice of any settlement, but, save as "aforesaid, shall operate only as a contract for valuable "consideration to carry out the transaction after the requisite "vesting instrument has been executed or made, and a purchaser of a legal estate shall not be concerned with such "disposition unless the contract is registered as a land charge." It is said that the effect of the sales in this case, there not having been a vesting deed or assent, is that they operate only as contracts for sale, and that accordingly the purchase money which in fact has been received by the trustees is in a sense money which they ought not to have received.

I should note that s. 75, sub-s. 1, provides: "Capital money "arising under this Act shall, in order to its being invested or "applied as aforesaid, be paid either to the trustees of the "settlement or into court at the option of the tenant for life, "and shall be invested or applied by the trustees, or under the "direction of the court, as the case may be, accordingly." Sub-s. 5 says: "Capital money arising under this Act while

FARWELL J.
1938
JEFFERYS, *In re.*
FINCH *v.* MARTIN.

"remaining uninvested or unapplied, and securities on which "an investment or any such capital money is made shall for "all purposes of disposition, transmission and devolution be "treated as land, and shall be held for and go to the same "persons successively, in the same manner and for and on the "same estates, interests, and trusts, as the land wherefrom "the money arises would, if not disposed of, have been held "and have gone under the settlement."

I must turn now to ss. 108 and 109. Sect. 108, sub-s. 1, provides: "Nothing in this Act shall take away, abridge, or "prejudicially affect any power for the time being subsisting "under a settlement, or by statute or otherwise, exercisable "by a tenant for life, or (save as hereinafter provided) by "trustees with his consent, or on his request, or by his direc-"tion, or otherwise, and the powers given by this Act are "cumulative." Sub-s. 2 provides: "In case of conflict between "the provisions of a settlement and the provisions of this "Act, relative to any matter in respect whereof the tenant for "life or statutory owner exercises or contracts or intends to "exercise any power under this Act, the provisions of this "Act shall prevail; and, notwithstanding anything in the "settlement, any power (not being merely a power of revoca-"tion or appointment) relating to the settled land thereby "conferred on the trustees of the settlement or other persons "exercisable for any purpose, whether or not provided for in "this Act, shall, after the commencement of this Act, be "exercisable by the tenant for life or statutory owner as if it "were an additional power conferred on the tenant for life "within the next following section of this Act and not other-"wise." Sect. 109 provides: "(1.) Nothing in this Act pre-"cludes a settlor from conferring on the tenant for life, or "(save as provided by the last preceding section) on the "trustees of the settlement, any powers additional to or larger "than those conferred by this Act. (2.) Any additional or "larger powers so conferred shall, as far as may be, notwith-"standing anything in this Act, operate and be exercisable in "the like manner, and with all the like incidents, effects, and "consequences, as if they were conferred by this Act, and, if "relating to the settled land, as if they were conferred by this "Act on a tenant for life."

The first question of construction which I have to consider is the true meaning of sub-s. 1 of s. 108. The difficulty arises by reason of the use of the words "or otherwise" for the second time therein. Apart from those words the sub-section seems to be reasonably plain. The effect of the first part of it is that nothing in the Act is to take away any power subsisting under a settlement or by virtue of statute or otherwise exercisable by a tenant for life. So far that is simply saying that no power of that sort exercisable by a tenant for life shall be affected prejudicially by the Act. The sub-section continues: "or . . . . by trustees"—that is to say, any power exercisable by trustees—"with his consent"—that is the tenant for life's consent—"or on his request, or by his direction. . . . ." That again means that no powers exercisable by the trustees with the consent or on the request or by the direction of the tenant for life are to be affected prejudicially by the Act. The sub-section also provides: ". . . . and the powers given by "this Act are cumulative." So that there may be two powers, a power given by the Act and a power given by the settlement. The difficulty arises with regard to the words "or otherwise." Do the words "or otherwise" apply only to a power exercisable by the trustees with the consent of the tenant for life, whether the sale is to be with the consent or by the request of or at the direction of the tenant for life or by some other act to be done by the tenant for life; or do the words mean in general any power which is given to trustees to be exercised with the consent of other persons? It appears to me that on the true construction of the section the limited meaning is the true one to put upon it. What is being preserved thereby, is, in my judgment, a power given to the trustees, where that power is one which can only be exercised with the consent, on the request or by the direction or by some other act of the tenant for life, and it does not refer to the consent or request of some other person. I find it difficult to appreciate exactly what the intention was in inserting the words "or otherwise," but, I think, it would be reading into them more than the

FARWELL
J.
1938
JEFFERYS,
In re.
FINCH
v.
MARTIN.

sub-section is intended to effect if I were to treat it otherwise than as I have indicated, in the limited sense as referring to something which the tenant for life is to do or abstain from doing. Therefore, it seems to me that sub-s. 1 of s. 108 does not operate to save a power of sale given to the trustees which is only exercisable with the consent not of the tenant for life, but of some person other than tenant for life. Of course, it is, as it were, a saving sub-section; it is restricted to those particular powers which are mentioned in it, and in my judgment it does not extend to protect the particular power in this case.

Sub-s. 2 of s. 108 provides: "In case of conflict between the "provisions of a settlement and the provisions of this Act, "relative to any matter in respect whereof the tenant for life "or statutory owner exercises or contracts or intends to "exercise any power under this Act, the provisions of this Act "shall prevail; and, notwithstanding anything in the settle-"ment, any power (not being merely a power of revocation or "appointment) relating to the settled land thereby conferred "on the trustees of the settlement or other persons exercisable "for any purpose, whether or not provided for in this Act, "shall, after the commencement of this Act, be exercisable by "the tenant for life or statutory owner as if it were an addi-"tional power conferred on the tenant for life within the next "following section of this Act and not otherwise." It becomes necessary to consider whether in a case of this sort there is a conflict between the provisions of the settlement and the provisions of the Act. Under the settlement there is no power in the trustees to sell the land at all except with the consent of Mr. Martin; under the Act the trustees have a power of sale as statutory owners enabling them to dispense with the consent of Mr. Martin or any one else. It is said that in truth there is no conflict between those provisions because the trustees might sell with the consent of Mr. Martin and such a sale would not of itself be improper under the Act, although they could not sell under the settlement without his consent. I appreciate that it might be said that you could have two such powers side by side and that there was no conflict between the provisions of the settlement and of the Act, but to my mind that is not the true view; it seems to me that the true construction of this section is that where the Act gives to the tenant for life or the trustees or the statutory owners a general power of sale, then a power of sale in the settlement which is only a limited power because it is restricted by conditions is one which is inconsistent with the general power of sale which the Act confers.

In my judgment, there is a conflict in a case of this kind between the provisions of the settlement and the provisions of the Act, because the provisions of the settlement are that there shall be no sale without the consent of Mr. Martin so long as he is alive, whereas the provisions of the Act are that the trustees shall be given a power of sale during Mr. Martin's life without his consent and disregarding him altogether. Although I can see that it is possible to say that to some extent the two powers might co-exist, nevertheless the provisions of the settlement and of the Act are, in my judgment, inconsistent. The settlement visualizes only a power which could be exercised in one particular way and in no other way at all, whereas the Act itself intends that there shall be a general power which shall be subject to no conditions at all.

On the whole I have come to the conclusion that the effect of the Act is that as from January 1, 1926, the power of sale was a power which was vested in the trustees under the Act and that that was the only power which as from that date could properly be exercised by them. The effect of the exercise of their power under the Act was that the proceeds of sale were to be treated as capital moneys and subject to the trusts of the settlement. Under the settlement the land was to be retained and the income was to be accumulated, but, as the law makes accumulation no longer possible, there is no disposition of the income for the period from June 15, 1933, during the remainder of the life of Mr. Martin. Accordingly, in my judgment, there is an intestacy to the extent of such income during the remainder of the life of Mr. Martin as from that date, with the result that the income which would have been accumulated can no longer be

FARWELL J.

1938

JEFFERYS, *In re.* FINCH *v.* MARTIN.

accumulated and added to capital, but must be dealt with as undisposed of by the testator. I make a declaration accordingly that "the proceeds of the sale of the parts of the testator's "real estate which were sold between December 31, 1925, "and June 16, 1933, and the accumulations of the income of "such proceeds of sale ought to be retained by the said "trustees and the income thereof as from June 15, 1933, should "be paid to the testator's heirs in gavelkind."

Solicitors: *Dollman & Pritchard, for Hayward, Smith & Mackey, Rochester*; *Kingsford, Dorman & Co., for Tassell & Son, Faversham*; *Treasury Solicitor.*

F. H. C.

FARWELL J.

1938

Nov. 10.

In re BUCHANAN-WOLLASTON'S CONVEYANCE.

CURTIS *v.* BUCHANAN-WOLLASTON.

[1938. B. 1561.]

Covenant—Conveyance of land to joint tenants—Intention to preserve as open space—Deed of covenant executed by joint tenants—Restrictions on user—Application by one of joint tenants to Court to order sale—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *ss.* 35, 36.

In 1928 four persons were respectively the owners and occupiers of dwelling-houses in the immediate vicinity of a piece of open land which they purchased, providing the purchase money in unequal shares, and which was conveyed to them in fee simple as joint tenants. They afterwards entered into a deed of covenant which recited that they had purchased the land so as to secure that it should not be so used as to be a nuisance or annoyance or to cause depreciation in the value of their properties, and which regulated the future user of the land and dealings therewith, providing for the determination of disputed questions arising with reference to it by vote among the joint tenants. In 1938, one of the parties, having sold his house, desired the land to be sold contrary to the wishes of the other persons concerned and applied to the Court to order a sale:—

Held, (1.) that by virtue of s. 36 of the Law of Property Act, 1925, the conveyance had created a trust for sale and the land vested in the purchasers on the statutory trusts defined by s. 35, but (2.) that the Court would not compel immediate execution of the trust at the instance of a person whose object was to avoid his contractual obligations.

ADJOURNED SUMMONS.

By a conveyance dated August 22, 1928, a piece of open land beside the sea in the neighbourhood of Lowestoft was conveyed to Hugo John Buchanan-Wollaston, the first defendant, Frank Percy Curtis, the plaintiff, Constancia Rebecca Stephana Serjeant, spinster, and Thomas William Seager Berry in fee simple as joint tenants. The purchase price of 550*l.* was provided by them in the following proportions: the first defendant 150*l.*, the plaintiff 200*l.*, Constancia Rebecca Stephana Serjeant 100*l.* and Thomas William Seager Berry 100*l.*

The first defendant owned and occupied land and a dwelling-house known as "The Pantiles" adjoining the land purchased on the north-west. The plaintiff and Constancia Rebecca Stephana Serjeant owned and occupied pieces of land and dwelling-houses known respectively as "The Grange" and "Crohamhurst" to the north-west of the land purchased and separated from it only by a road. Thomas William Seager Berry owned and occupied land and a dwelling-house known as "World's End" adjoining "Crohamhurst" on the side remote from the land purchased, but sufficiently close to be affected by its user.

On September 17, 1928, the purchasers entered into a deed of covenant which recited that the land "was purchased by "them with the object of securing that it should not be used "in any manner which might be a nuisance or annoyance "or cause any detriment to or depreciation in value of their "said properties."

The deed proceeded: "Now each of the parties hereto in "consideration of the covenants and stipulations hereinafter "contained hereby mutually covenants and agrees with each "of the others of them as follows, that is to say:

"1. No part of the joint land shall be dealt with in any "way which may be or become a nuisance or annoyance "or cause any detriment to or depreciation in value of any "of the before-mentioned properties of the parties hereto "respectively. . . . .

"4. No building, structure or erection of any kind . . . . "shall except with the consent of each of the parties hereto "which consent must be a unanimous consent, be at any time "erected on" [a defined area of the land]. "Any transaction "in connection with the parcel of land mentioned in this "clause must be unanimously agreed to by all the parties "hereto.

"5. All profits arising from any sale, lease, letting, disposal "or otherwise out of the joint land shall belong to the parties "hereto in the proportions in which they contributed to the "purchase-money of the joint land, that is to say the said "Hugo John Buchanan-Wollaston three-elevenths, the said "Frank Percy Curtis four-elevenths, the said Constancia "Rebecca Stephana Serjeant two-elevenths and the said

"Thomas William Seager Berry two-elevenths, and all rates, "taxes, tithe and other outgoings, charges or expenses arising "in respect of the joint land shall be borne in the same "proportions.

"6. Save so far as is otherwise expressly provided by this "deed all questions arising with reference to the joint land "shall be determined in such manner as may be agreed "between the parties hereto or as, failing such agreement, "shall be determined by vote and for the purpose of any "such determination by vote the parties hereto shall be "entitled to votes as follows namely the said Hugo John "Buchanan-Wollaston three votes, the said Frank Percy "Curtis four votes, the said Constancia Rebecca Stephana "Serjeant two votes, and the said Thomas William Seager "Berry two votes."

By clause 7 provision was made for the transfer of the interests of the parties.

On August 16, 1930, Constancia Rebecca Stephana Serjeant transferred or purported to transfer all her share and interest in the land to the plaintiff. On June 16, 1932, Thomas William Seager Berry died. His executors, Violet Seager Berry and Thomas Geoffrey Seager Berry, were the second and third defendants to this summons.

The plaintiff, having sold his house and property and removed from the neighbourhood, desired the joint land to be sold and the proceeds of sale divided. The first defendant refused to concur in selling the land on the ground that any sale unless made on terms prohibiting building would be detrimental to the value of his adjoining property in jeopardising its amenities. He also contended that the transfer by Constancia Rebecca Stephana Serjeant of her interest in the land to the plaintiff was a breach of clause 7 of the deed of covenant, but the plaintiff had not attempted to use the voting powers which he claimed to have acquired thereby. The executors of Thomas William Seager Berry supported the first defendant.

By a summons taken out on April 21, 1938, the plaintiff sought (I.) a declaration that by virtue of s. 36 of the Law of Property Act, 1925, the land vested in him and in the first defendant on the statutory trusts for sale imposed by s. 35 of the Act; (2.) a declaration pursuant to s. 84 of the Act (*a*) that the land was not now affected by any of the restrictions imposed by the deed of covenant or alternatively (*b*) what were the nature and extent of the restrictions (if any) thereby imposed; (3.) that pursuant to s. 30 of the Act the first defendant might be ordered to concur with the plaintiff in selling the land; (4.) that the statutory trusts in relation to the land might be executed by the Court.

Roger Turnbull for the plaintiff. The deed of covenant cannot operate to prevent the statutory trusts for sale from taking effect. The case is exactly covered by s. 36, and s. 35 defines the statutory trusts. The result is that there is an immediate trust for sale. Since the trusts are statutory, anything seeking to override them must be inoperative. The land should be sold and the net proceeds of sale divided in the proportions fixed by clause 5 of the deed. The plaintiff also asks the Court to exercise its jurisdiction under s. 84 to discharge or modify restrictive covenants affecting land.

Gerald Upjohn for the defendants. The land is held on trust for sale, but that does not entitle the plaintiff to have the trust forthwith executed by the Court. The plaintiff, having entered into the deed as part of the transaction of acquiring the land, has disentitled himself to demand a sale otherwise than in accordance with its terms. The mere fact that there is a trust for sale does not entitle the trustees to overlook the circumstances of the case. The plaintiff is personally disentitled from insisting on a sale. He has agreed that a sale shall only take place in certain circumstances and subject to certain conditions. To deal with the land as is now proposed would be detrimental to the first defendant and would cause depreciation in the value of his property. A Court of equity will not assist the plaintiff to avoid his obligations. Machinery is provided by clause 6 for the determination by voting of questions relating to the land. This has not been invoked.

Roger Turnbull in reply. The plaintiff issued this summons to ascertain the legal position. He is really concerned with the question what restrictions should be imposed on the user of the land in the event of a sale. Nothing in the deed lays it down that there is to be no sale. The real undertaking of the parties was not to use the land so that it might become a nuisance or an annoyance. Nothing in the deed prevents the plaintiff from asking the Court to enforce the trust for sale.

FARWELL J. This summons raises a question in relation to a conveyance dated August 22, 1928, and a deed of covenant dated September 17, 1928. The circumstances in which the question arises are these. Four persons were owners of separate properties near Lowestoft, Mr. Buchanan-Wollaston the first defendant, Mr. Curtis the plaintiff, Miss Serjeant, and Mr. Berry, who is now dead, and whose executors are before the Court as defendants. In the immediate neighbourhood of their houses is a piece of land which runs down to the sea beach. Mr. Buchanan-Wollaston's house was at the north-western end of this piece of land and looked across it. The houses of the other persons looked straight across it from the north-east with only a road between. The house of Mr. Berry had not an uninterrupted view of the sea but was so situated as to benefit by the agreement to which I shall refer.

It was of great importance to Mr. Buchanan-Wollaston in particular and in a lesser degree to the others that the piece of land should be preserved as an open space. It might be unpleasant and would be detrimental to the value of their properties if houses, bungalows, or other buildings were erected on it which had the effect of spoiling the amenities which they enjoyed so long as the ground remained an open space. In those circumstances they agreed among themselves to purchase the land in question and on August 22, 1928, a conveyance was executed whereby the property was conveyed to them in fee simple to hold the same as joint tenants, The purchase price of 550*l.* was provided by them in unequal shares.

FARWELL J.
1938
BUCHANAN-WOLLASTON'S CONVEYANCE, *In re.*
CURTIS *v.* BUCHANAN-WOLLASTON.

The legal effect of the transaction was that the property vested in these four persons on the statutory trusts defined by s. 35 of the Law of Property Act, 1925, since the conveyance of the legal estate to them as joint tenants created a trust for sale by virtue of s. 36 of the Act. On September 17, 1928, the parties entered into a deed of covenant regulating future dealings with the land. By clause 1 it was agreed that no part of the joint land should be dealt with in any way which might be or become a nuisance or annoyance or cause any detriment to or depreciation in value of any of the properties of the parties. By clause 4 the erection of any building on a defined area of the land was forbidden save by the unanimous consent of the parties. By clause 5 it was provided that all profits arising out of the joint land should belong to the parties in certain proportions and that outgoings should be borne by them in the same proportions. By clause 6 provision was made for the determination by voting of questions arising with reference to the joint land. By clause 7 provision was made for the transfer of the interests of the parties.

On August 16, 1930, Miss Serjeant transferred her interest to the plaintiff who now contends that by reason of that transfer he has the right to exercise the voting power which she possessed. There is a dispute how far the assignment was a breach of clause 7 and that matter may have to be determined in other proceedings. At present no attempt has been made by the plaintiff to exercise the voting powers which he claims. All I am concerned with is this: What was the real object of the parties at the time when they bought the land and entered into the deed of covenant?

The plaintiff has sold his house and property near the land and has removed from the neighbourhood. He now wants the land to be sold and the proceeds divided. The defendant, Mr. Buchanan-Wollaston, is still the owner of his property adjoining the land and is not willing to agree to a sale. He says, and the evidence shows, that any sale unless made on terms prohibiting building might be detrimental to his land and he strongly objects to a sale. So far as the executors of Mr. Berry are concerned they support Mr. Buchanan-Wollaston.

The way in which the case is put by the plaintiff is that the property in question is held on trust for sale and that he is entitled to ask the Court to administer the trust by ordering the property to be sold. He says that he is willing for the property to be sold subject to certain restrictions, but that there being a statutory trust for sale he is entitled to insist on a sale notwithstanding that one of the co-trustees refuses to concur.

I have no doubt what the purpose of the deed of covenant was. It was to preserve the land as an open space. The parties all intended that nothing should be done with the land which the others thought detrimental to their respective properties. The question is this: Will the Court assist the plaintiff to do an act which would be directly contrary to his contract with the other parties, since it was plainly the intention of the parties to the said contract that the land should not be sold save with the consent of them all? Mr. Curtis is seeking to avoid the obligations under which he placed himself, and, since he cannot do that without the assistance of the Court, he now seeks that assistance by these proceedings. There is no doubt that the property is held on a trust for sale but I have to consider whether the Court will compel the immediate execution of the trust at the instance of a person whose purpose and object is to avoid his contractual obligations. In my judgment the Court ought not to compel the immediate execution of the trust under such circumstances. This is not the ordinary case of a beneficiary seeking to compel a trustee to carry out his duties as trustee. Here the Law of Property Act, 1925, has put these persons in the position of trustees holding on trust for sale and the plaintiff is seeking to take advantage of that to escape from the obligations which he has undertaken. I feel strongly that this Court should not assist the plaintiff in that attempt. The relief which he seeks he can obtain only in the Court of equity and that Court will not extend relief to one who is putting forward a claim to equitable assistance merely to enable him thereby to escape from his

FARWELL J.
1938
BUCHANAN-WOLLASTON'S CONVEYANCE, *In re.*
CURTIS *v.* BUCHANAN-WOLLASTON.

contractual obligations. To do so would be to disregard the well established rule of equity that he who seeks equity must do equity. I am content to deal with this summons by dismissing it with costs.

Solicitors: *Grundy, Izod & Co., for Wiltshire, Sons & Jordan, Lowestoft; George Thatcher & Son, for Sherwood & Co.*

F. H. C.

In re A DEBTOR.

[No. 38 of 1938.]

FARWELL
AND
MORTON
JJ.

1938

Oct. 31 ;
Nov. 14.

Bankruptcy—Sale of goods—Verbal order by buyer's agent—Goods delivered—Received by buyer's employee—Goods retained by buyer—No act by buyer in relation to goods—Enforceable contract to buy goods—Sale of Goods Act, 1893 (56 *&* 57 *Vict. c.* 71), *s.* 4, *sub-ss.* 1, 3 ; *s.* 35.

Goods to the value of 65*l.* 14*s.* 2*d.* were sold by verbal contract of sale to a debtor. The goods were delivered to an employee of the debtor, and remained on his premises for upwards of three weeks. The debtor himself did no act in relation to the goods :—

Held, that there was an acceptance within s. 35 of the Sale of Goods Act, 1893 (1), and the contract was enforceable so as to constitute a debt exceeding 50*l.* upon which a bankruptcy petition could be founded.

An acceptance within s. 35 constitutes compliance with s. 4, sub-s. 1, and makes compliance with s. 4, sub-s. 3, unnecessary. The purpose of s. 4, sub-s. 3, is to make contracts which comply with it enforceable, even though there has not been acceptance within s. 35.

APPEAL from County Court Registrar.

This was an appeal by a debtor from a receiving order made by the registrar of Croydon County Court. The debtor was a builder and the respondents to the appeal were manufacturers and suppliers of kitchen fitments.

The grounds of the appeal were that the registrar had no evidence that the debtor was indebted to the respondents in a liquidated sum of at least 50*l.*, or that the provision of s. 4, of the Sale of Goods Act, 1893, in respect of an alleged contract for sale to the debtor of goods to the value of 65*l.* 14*s.* 2*d.* had been satisfied, or that the debtor had accepted the goods so as to satisfy that section.

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(1) By s. 4, sub-s. 1, of the Sale of Goods Act, 1893 : "A contract "for the sale of any goods of the "value of ten pounds or upwards "shall not be enforceable by "action unless the buyer shall "accept part of the goods so sold, "and actually receive the same, "or give something in earnest to "bind the contract or in part "payment, or unless some note or "memorandum in writing of the "contract be made and signed by "the party to be charged or his "agent in that behalf."

By sub-s. 3: "There is an "acceptance of goods within the "meaning of this section when the "buyer does any act in relation "to the goods which recognizes "a pre-existing contract of sale "whether there be an acceptance "in performance of the contract "or not."

By s. 35: "The buyer is "deemed to have accepted the "goods when he intimates to the "seller that he has accepted them, "or when the goods have been "delivered to him and he does any "act in relation to them which is "inconsistent with the ownership "of the seller, or when, after the "lapse of a reasonable time, he "retains the goods without inti-"mating to the seller that he has "rejected them."

On March 3, 1938, the debtor's authorized agent orally ordered from the respondents goods to be made and delivered at the debtor's premises, and the respondents orally accepted the order. A little later the debtor recorded, in his purchases day book and bought ledger, the order and the price, which was 65*l.* 14*s.* 2*d.*

The goods were delivered at the debtor's premises on March 18, 1938. There was no evidence that he was there at the time, but his foreman referred the man delivering the goods to one of the debtor's employees, who received them and had them left on the premises, where they stayed until after April 12, 1938.

On March 29, 1938, the debtor executed, for his creditors' benefit, a deed of assignment not expressly excluding the goods from the property assigned. Before April 12, 1938 (the date of presentation of the petition on which the receiving order was made) the debtor had done other business with the respondents, but he owed them altogether, excluding the price of the goods, under 50*l.*, and their counsel admitted that, if the dealings with the goods did not create an enforceable contract, a receiving order could not be made. The registrar held that they did create an enforceable contract, and he made the receiving order.

The debtor now appealed.

H. J. Astell Burt for the debtor as appellant. In *Page* v. *Morgan* (1) it was held that an absolute acceptance of goods is not necessary in order to comply with s. 17 of the Statute of Frauds, and that, if the buyer has received goods on delivery and done anything with regard to them amounting to a recognition of a contract by him to purchase them, that is

(1) (1885) 15 Q. B. D. 228.

enough evidence of acceptance of them within the section, even if he refuses them afterwards: see Benjamin on Sale, 7th ed., p. 209.

In the present case the goods, in view of the provisions of s. 4 of the Act, are not and never have been the subject-matter of an enforceable contract. It may be true that they have been allowed to stay on the appellant's premises without his doing anything about it: but, even if that constitutes an acceptance within s. 35, it is not an acceptance within s. 4, sub-s. 3: and, for the respondents to succeed on this appeal, it must be shown that there was an acceptance within that sub-section, i.e., that the debtor has done something showing that he recognizes that the goods are the subject-matter of a pre-existing contract for sale. He did not, in fact, do any such thing, and there was no pre-existing contract. He was not, therefore, indebted to the respondents in the amount of the price of the goods and the registrar ought not to have made the order.

Eric Sachs K.C. and *G. F. Kingham* for the petitioning creditors as respondents. The goods were retained without any intimation of rejection. That undoubtedly constituted an acceptance within s. 35, and any such acceptance must equally be an acceptance under s. 4, sub-s. 1. Sect. 4, sub-s. 3, provides: "There is an acceptance of goods within "the meaning of this section when the buyer does any act in "relation to the goods which recognises a pre-existing contract "of sale. . . ." That provision is not meant to be read as if the word "only" was inserted before the word "when": see Halsbury's Laws of England, 2nd ed., vol. 29, pp. 28–29. In *Taylor* v. *Great Eastern Ry. Co.* (1) certain goods had been sent to a station. The buyer had been informed that they would be left there and attempted to re-sell them. It was held that the attempt to re-sell the goods was enough to constitute acceptance. In his judgment Bigham J. said: "I think that the absence of a memorandum in writing, and "of the other conditions mentioned in s. 4, sub-s. 1, of the Sale "of Goods Act, does not make a contract void or even voidable.

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(1) [1901] 1 Q. B. 774, 778, 779.

"The contract is good. The only effect of the non-fulfilment "of the statutory conditions is that it is unenforceable. And, "the contract being good, all the legal consequences of a "contract follow; so that, if the contract is for the sale of "specific goods, the property in the goods passes to the buyer." In the headnote that expression of opinion is rendered as follows: "*Semble,* the fact that a contract for the sale of "goods does not comply with the requirements of s. 4 of the "Sale of Goods Act, 1893, though it renders the contract "not enforceable by action, does not make it void, and does not "prevent the property in the goods from passing under it to "the purchaser." The whole question of acceptance may be put thus: is there evidence that the person who took the goods took them as buyer? Here there is clear evidence that he did so: and the receiving order was properly made and ought to stand.

H. J. Astell Burt in reply. An acceptance within s. 35 is not an acceptance within s. 4 unless the provisions of s. 4, sub-s. 3, are satisfied. Sect. 35 comes within Part III. of the Act, which is headed "Performance of the Contract," and begins with s. 27. Benjamin takes the view that it is difficult to see how mere passivity can amount to an act: Benjamin on Sale, 7th ed., p. 215. The passing of the property is wholly independent of the question whether or not s. 4 can be satisfied: *Taylor* v. *Great Eastern Ry. Co.* (1) The mere fact that the goods were delivered on March 18 and were still on the premises after April 12 is not evidence to connect the debtor with them and is not enough to entitle the Court to draw the inference that there was a retention of the goods by the debtor within s. 35.

Cur. adv. vult.

1938. Nov. 14. FARWELL J. The judgment which I am about to read is the judgment of the Court (Farwell and Morton JJ.).

This is an appeal from a receiving order made by the registrar of the county court holden at Croydon against the appellant on July 8, 1938.

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(1) [1901] 1 Q. B. 774.

The relevant facts are these: the appellant is a builder, and in the early part of the present year was occupied in converting two houses in Croydon into six flats. The respondents are manufacturers and suppliers of certain kitchen fitments. On March 3, 1938, the brother, and authorized agent, of the appellant orally ordered from the respondents five kitchen fitments to be made and delivered to the appellant at the place where the work of converting the houses into flats was in progress. The respondents orally accepted the order. Shortly after the order had been given the appellant made entries in his purchases day book and in his bought ledger recording the order and the price of the goods, which amounted to the sum of 65*l.* 14*s.* 2*d.* On March 18, 1938, the respondents duly took the goods to the appellant's premises. There is no evidence that the appellant was present on that occasion, but the appellant's foreman referred the man in charge of the goods to be delivered to an employee of the appellant, who received the goods and had them deposited on the appellant's premises. The goods in question were of considerable size and were delivered without any packing or covering of any sort.

The goods remained on the appellant's premises until after April 12, 1938. On March 29, the appellant executed a deed of assignment for the benefit of his creditors. The deed did not in terms exclude from the property assigned the particular goods in question. On April 12, the respondents presented the petition on which the receiving order appealed against was made. The appellant and respondents had had other dealings prior to the particular order in question, but the total indebtedness of the appellant to them, excluding these five kitchen fitments, was under 50*l.*, and it was conceded by counsel for the respondents that, if the transaction relating to these goods did not result in an enforceable contract, the debt due to them was under 50*l.* and no receiving order could be made. The question, therefore, for the registrar was whether or not there was an enforceable contract between the parties with regard to these kitchen fitments. The learned registrar held that there was

FARWELL AND MORTON JJ.

1938

A DEBTOR, *In re.*

an enforceable contract and accordingly made the receiving order.

The question for the decision of this Court is whether or not that order was rightly made. It is admitted that the order for the goods was given orally by the appellant, and accepted orally by the respondents, that the goods were delivered at the appellant's premises and received by his employee and deposited on his premises, where they remained until after April 12, without objection from the appellant and with no suggestion of repudiation of the contract by him; there is, however, no evidence that he was himself aware that the goods had been delivered or were deposited on his premises. Under these circumstances it is said on behalf of the appellant that, having regard to s. 4 of the Sale of Goods Act, 1893, there is not and never was an enforceable contract in respect of those goods. In our judgment that contention is not well founded. Sect. 4, sub-s. 1, provides that a contract for the sale of goods of the value of 10*l.* or upwards shall not be enforceable by action unless the buyer accepts part of the goods so sold and actually receives the same or (omitting the words in the section which do not apply in this case) unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf. Sub-s. 3 provides that there is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognizes a pre-existing contract of sale; whether there be an acceptance in performance of the contract or not. Acceptance is defined in s. 35 of the Act, and, in our judgment, on the facts of this case, it is clear that there was "acceptance" of the goods within the meaning of that section. It is said, however, on behalf of the appellant that acceptance within the meaning of s. 35 is not sufficient to make the contract enforceable under s. 4, that acceptance for the purpose of that section must be acceptance as defined by sub-s. 3, and that in the present case there has been no such acceptance, because although the acceptance and retention of the goods may have been within the scope of the agent's general authority, it was not within

FARWELL AND MORTON JJ.

1938

A DEBTOR, *In re.*

his authority to do any act on behalf of his principal that recognized a pre-existing contract.

In our judgment the answer to that contention is that, once there has been an acceptance within s. 35, the requirements of s. 4 have been complied with and it is unnecessary to consider sub-s. 3. The object of sub-s. 3 is to provide that a contract may be enforceable if the requirements therein are complied with, even though there may be no acceptance within the meaning of that word as defined in s. 35. The appellant's contention involves reading into s. 4, sub-s. 3, the word " only " immediately before the words " when the buyer," and we can see no justification for so reading the sub-section. Sub-s. 3 and s. 35 are in no way contradictory. If there is acceptance within the meaning of the later section, the requirements of s. 4 have been complied with, but if there is no acceptance within s. 35 there may still be acts amounting to acceptance within the meaning of sub-s. 3 which will render a verbal contract enforceable.

For these reasons, in our judgment, the learned registrar came to a right conclusion, and under those circumstances it is unnecessary to express any opinion on the other points which were argued before us. The appeal will be dismissed.

Appeal dismissed.

Solicitors: *Yarde & Loader; Hyde, Mahon & Pascall.*

K. R. A. H.

SIMONDS
J.
1938
Nov. 1.

In re LEWIS.

JENNINGS *v.* HEMSLEY.

[1891. L. 1577.]

Administration—Leasehold estate—Repairing covenants—Indemnity of executors against liability—Indemnity fund paid into Court—Liability statute-barred—Payment out to beneficiaries.

Where, in an action for administration of the estate of a testator which comprised leaseholds, a sum of money has been paid into Court to provide a fund for the indemnity of the executors against any liability on the lessee's covenants in the leases, there is no necessity to retain the fund in Court after the expiration of a period on the expiration of which any possible action by the lessors against the executors would be statute-barred ; and, after that period has expired, the Court will order the fund to be paid out to the beneficiaries.

PROCEDURE SUMMONS.

The testatrix, Jemima Lewis, by her will dated January 23, 1886, appointed Henry Julian Bigsby and Alexander Hemsley executors and trustees thereof and bequeathed certain freehold and leasehold property to Caroline Wilson, and gave her residuary estate upon trusts which were revoked by a codicil to her will, and by that codicil dated March 20, 1886, gave all her residue equally between Caroline Wilson and Edith Bigsby. The testatrix died on March 31, 1890, and her will and four codicils thereto were duly proved by both her executors in the Principal Probate Registry. Henry Julian Bigsby died on July 14, 1890, and on October 7, 1890, Edith Bigsby in pursuance of a power contained in the will appointed the plaintiffs Cecil Frederick Joseph Jennings and Ernest Haslope Oldham trustees of the will.

Part of the testatrix's estate consisted of thirty-two leasehold cottages at West Ham and Stratford let at small weekly rents. The whole of this property was comprised in two leases for terms of one hundred and five years granted in 1847 and 1848, to which the husband of Mrs. Jemima Lewis had become entitled by assignment and which had been bequeathed to her on the death of her husband. The leases contained usual repairing covenants.

The surviving executor, Alexander Hemsley, who was also the surviving executor of the husband, refused to distribute the estate of the testatrix until provision had been made thereout to indemnify him against any liability to which he might be subject on the repairing covenants in the leases. The husband of Mrs. Jemima Lewis had entered into the usual covenants for indemnity on the assignment to him.

An action for the administration of the estate of the testatrix was commenced in 1891, and in that action an order was made on August 3, 1891, by consent that, the plaintiffs admitting that the defendant Hemsley was entitled to be indemnified against any liability in respect of the leasehold hereditaments forming part of the estate, the defendant Hemsley was to be at liberty to pay out of the assets of the testatrix in his hands the sum of 5,000*l.* into Court for that purpose. It appeared from the order that all the debts and legacies of the testatrix had been paid in full. The leases had been assigned to beneficiaries in or about 1891. The whole of the sum of 5,000*l.* remained in Court until this petition for payment out in 1937. Alexander Hemsley died on December 9, 1906, and Edith Bigsby on April 13, 1935. The applicants, Cecil Frederick Joseph Jennings and Cuthbert Arthur Lea Wilson, were the executors of her will.

The petition stated that the petitioners were advised that in the events which had happened the sum of 1,885*l.* would be a sufficient sum to retain in Court as an indemnity fund to indemnify the persons claiming under the late Alexander Hemsley from any liability in respect of the premises above referred to, but they would be satisfied if half the fund were retained in Court.

By an order made in May, 1937, the Court directed an inquiry what was an adequate sum to retain in Court for the above-mentioned indemnity, and the petition was to stand over until the Master had made his certificate in answer to the inquiry.

Upon the proceedings in Chambers for this inquiry the point was taken on behalf of the beneficiaries that it was no longer necessary to retain any money in Court as an indemnity fund, as no claim could now be made against the estate of Alexander Hemsley. The Master adjourned this question into Court for argument, in pursuance of Order LV., r. 69.

Leonard Stone for the executors of Caroline Wilson. There is now no need to retain any part of this fund in Court. It was paid in to provide a fund for an indemnity which has long since ceased to be necessary. In every case after the money paid into Court in circumstances like the present has been in Court for more than six years after the executors have assigned the lease, the necessity for an indemnity is at an end, for the executors can plead the Statute of Limitations under the provisions of the Trustee Act, 1888, s. 8. Otherwise the distribution of estates might be held up for the whole duration of a long lease—in the present case the term is one of one hundred and five years.

The order made in 1891 contains an admission by all parties that all the debts and legacies of the testatrix had been paid. See *In re Nixon* (1), which decides that the Court, on making an order for the distribution of the estate of a testator among his residuary legatees, will not set apart any of the assets to indemnify executors against possible liabilities in respect of leases unless there is privity of estate between the executors and the lessors : *In re King* (2).

It is not the practice of the Court to retain funds in Court for the protection of a future contingent creditor. Here the money was paid in, not for the benefit of any creditor who has no claim to it, but for the protection of the executor : *In re Blow.* (3)

Even assuming there was privity of estate between the late Alexander Hemsley and the lessors of this property, any action against his estate or executors on the covenants in the leases has long been statute-barred.

Payment of a trust fund into Court by a trustee is a retirement from the trust. It is not necessary in the present case to decree administration and to order an inquiry into debts.

(1) [1904] 1 Ch. 638.
(2) [1907] 1 Ch. 72, 80.
(3) [1914] 1 Ch. 233.

There is no conceivable claim against this fund which can be formulated, and all that the Court should do is to order payment of it to the beneficiaries.

[He also referred to *In re Williams' Settlement.* (1)]

A. G. Coulson for the executors of Mrs. Edith Bigsby adopted this argument.

J. V. Nesbitt for the personal representatives of Alexander Hemsley. Whatever order is made in this case my clients will be protected if full disclosure is made to the Court of all relevant facts: see the remarks of Kindersley V.-C. in *Dodson* v. *Sammell* (2) cited by Byrne J. in *In re Nixon.* (3) This case shows that the Court will not direct a fund to be set aside where there is no privity of estate between the executors and the lessor, although there might be a liability on the covenants, the testator, who was the lessee, having assigned them in his lifetime. In such a case an executor who distributes the estate without provision for a probable liability, may be liable for a devastavit, for which the period of limitation is six years: *In re Blow.* (4)

Where there is privity of estate between the executors and the lessor, it is the practice of the Court to set aside a fund; but the executors in this case assigned the leases to beneficiaries nearly fifty years ago. Since they had privity of estate with the lessor they would be personally liable for a breach of covenant committed before the assignment for a period of twenty years from the date of breach, but not longer. In a case like the present the executors will in future be protected by the Trustee Act, 1925, s. 26. See note in Wolstenholme & Cherry's Conveyancing Statutes at p. 1306, and *In re Lawley* (5), a case under the corresponding section of the earlier statute, Lord St. Leonard's Act.

SIMONDS J. This somewhat important point has been referred to me under Order LV., r. 69. In May, 1937, a petition was presented to this Court by which the petitioners asked for payment out to them of part of a fund in Court, assenting to part of it remaining in Court for an indemnity to executors against certain liabilities. On the matter coming before me I ordered that an inquiry should be made as to what sum was needed to provide the indemnity required.

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(1) (1858) 4 K. & J. 87.
(2) (1860) 1 Dr. & Sm. 575.
(3) [1904] 1 Ch. 638, 645.
(4) [1914] 1 Ch. 233.
(5) [1911] 2 Ch. 530.

But on the matter going back to chambers the point was taken that, having regard to lapse of time, no provision was now needed for any indemnity, and this is the question which has been argued before me.

The matter stands thus : the fund was paid into Court in 1891 in the administration of the estate of one Mrs. Jemima Lewis under an order by which it was by consent ordered that the defendant Alexander Hemsley, the executor of the testatrix, should be at liberty out of the assets of the testatrix remaining in his hands to raise the sum of 5000*l.* and the costs thereinafter directed to be paid into Court, the plaintiffs by their solicitor admitting that the defendant was entitled to be indemnified out of the assets of the testatrix against liability in respect of the leasehold hereditaments at Stratford and West Ham, bequeathed by the will of the testatrix to the plaintiff Caroline Wilson. On that it was ordered that the executors should be at liberty to distribute the estate of the testatrix.

It further appeared from the order that all parties by their solicitors admitted that all the debts and legacies of the testatrix had been paid and that her estate had been fully and properly administered with the exception of the payment of the further costs therein directed to be paid, and that the accounts delivered by the defendant, including his costs, charges and expenses down to May 25, 1891, were correct. The sum of 5000*l.* was accordingly paid into Court and the income thereof has since then been regularly paid to the beneficiaries entitled under the will.

Now it is urged that the time has come when the representatives of the testator's estate no longer need any protection or indemnity. In my judgment that proposition is correct. It is established by a line of authorities of which I need cite only *In re Nixon* (1) and *In re King* (2) that if a fund

(1) [1904] 1 Ch. 638.

(2) [1907] 1 Ch. 72.

be paid into Court in such circumstances as those in which this fund was paid, that is done not for the benefit of the lessors, but solely for the indemnity of the executors or trustees so paying it in. The lessor as a possible future creditor has no right to require that such a fund shall be provided. The only question then is whether in 1938 the legal personal representatives of Mrs. Jemima Lewis, who are the executors of her executor the original defendant Alexander Hemsley, need any protection from any possible liability under the leases which formed part of her estate. They have, as was shown by *In re Blow* (1), a complete answer to any claim that may be made against them in this respect. A distinction has been drawn in some earlier authorities referred to in *In re King* (2) between cases where there has been privity of estate between the executors and the lessor, and cases where there has not been such privity. But if there is such a distinction, I do not appreciate its importance except that it may be that where there has been privity of estate the executor may have to rely on some other Statute of Limitations than the Statute of James I. and that a longer period may have to elapse before his liability is brought to an end.

But whether that be so or not, it is now nearly fifty years since the leaseholds were assigned by the executors and the fund was paid into Court, and therefore the answer to the question whether any and what fund is now needed for the protection of the legal personal representatives of the testatrix is that no fund is now needed.

In view of the importance of the matter there should be a pro forma summons taken out raising the question now answered, upon which I will make the declaration that I have indicated; the order for inquiry will be discharged and the petition must be amended and restored.

Solicitors: *Walter O. Freeman; Samuel Price & Sons; Halsey, Lightly & Hemsley.*

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(1) [1914] 1 Ch. 233.

(2) [1907] 1 Ch. 72.

H. L. L.

SIMONDS
J.

1938
Nov. 4, 17.

In re SANGER (DECEASED).

TAYLOR *v.* NORTH.

[1938. S. 2241.]

Administration—Payment of death duties and testamentary and administration expenses—Order of application of assets—"Property undis-"posed of by will"—Lapsed shares of residue—Direction to pay all death duties out of estate—Statutory order not varied by will—Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23), *s.* 34, *sub-s.* 3; *Sch. I., Part II.*

A testatrix by her will after appointing executors and bequeathing pecuniary legacies and annuities, gave all the residue and remainder of her estate equally between five persons named, and then directed that all duties payable on her death should be discharged out of her estate. The testatrix died in 1936, but two of the residuary legatees predeceased her and their shares lapsed and devolved as on an intestacy:—

Held, that there was no declaration contained in the will to exclude the operation of s. 34, sub-s. 3, of the Administration of Estates Act, 1925, and therefore pecuniary legacies, and the legacy duty thereon, estate duty on the personal estate, funeral and testamentary expenses, debts and administration expenses were primarily payable out of the lapsed shares of residue.

In re Lamb [1929] 1 Ch. 722 followed.

In re Kempthorne [1930] 1 Ch. 268 and *In re Tong* [1930] 2 Ch. 400; [1931] 1 Ch. 202 distinguished.

SUMMONS.

The testatrix, Miss Eva Sanger, made her will on November 24, 1927, and thereby appointed two executors (one of whom predeceased her), and, after bequeathing certain legacies and annuities, devised and bequeathed all the rest residue and remainder of her real and personal estates unto and equally between five named persons. By clause 7 of her will the testatrix directed that all duties payable on her death should be discharged out of her estate.

The testatrix subsequently made two codicils to her will by which the pecuniary legacies were increased, and died on June 20, 1936, a spinster, and without any near relations. Two of the residuary legatees named had predeceased her.

The summons was taken out to obtain an inquiry who were the next of kin of the testatrix, and to determine the question whether any and which of the following payments to be made in administering the estate were chargeable to the two fifth shares of the estate as to which the deceased died intestate, or were chargeable to the whole estate before division thereof—namely: (*a*) pecuniary legacies; (*b*) estate duty payable on personal estate; (*c*) legacy duty on the legacies; (*d*) the funeral and testamentary expenses, administration expenses and debts of the testatrix.

A. H. Droop for the plaintiff.

Milner Holland for the defendants Julia Catherine North and Marian Skinner, residuary legatees. In order to vary the statutory order of application of assets in payment of debts, funeral and testamentary expenses, legacies and other liabilities there must be some expression of intention found in the will sufficient to exclude the Act. This will contains no such expression, and therefore all the items mentioned in the summons are payable primarily out of the two lapsed shares of residue.

Clause 7 of the will directing payment of duties out of the estate is perfectly neutral; it does not say out of what part of the estate the duties are to be paid.

The case is covered by the decision of Eve J. in *In re Lamb* (1), which has been approved by the Court of Appeal in *In re Worthington* (2) and *In re Tong.* (3) *In re Petty* (4) is readily distinguishable, as there a mixed fund for payment of debts and funeral and testamentary expenses and legacies was created.

A general direction to pay debts, etc., does not exclude the operation of the Act.

[He also referred to *In re Kempthorne.* (5)]

Hon. B. L. Bathurst for Minnie Blanche Gilbert, another residuary legatee. The object of clause 7 of the will was to

(1) [1929] 1 Ch. 722.
(2) [1933] Ch. 771.
(3) [1931] 1 Ch. 202.
(4) [1929] 1 Ch. 726.
(5) [1930] 1 Ch. 268.

SIMONDS J.
1938
SANGER, *In re.*
TAYLOR *v.* NORTH.

give the pecuniary legacies and annuities free of duty, and that is the whole of its effect. No intention to exclude the statutory order can be read in it.

H. O. Danckwerts for a defendant appointed to represent next of kin. The only other reported case under the section is *In re Atkinson* (1), where Clauson J. followed *In re Petty.* (2) The present case is more like *In re Tong* (3) than *In re Lamb* (4), as there is a direction that a particular class of liability is to come out of the estate ; i.e., the estate as a whole.

The Court of Appeal in *In re Tong* (3) accepted the decision of Clauson J. as correct and gave effect to a direction which was just as simple as in the present case.

As regards items (*a*) and (*d*) there is no specific direction in the will affecting them, and the statutory order will apply. But as regards (*b*) and (*c*) covering all legacy and estate duties, there is a specific direction that they are to come out of the general estate.

Cur. adv. vult.

1938. Nov. 17. SIMONDS J. Eva Sanger made her last will on November 24, 1927, and, having by clause 2 thereof appointed executors, by clause 3 bequeathed certain pecuniary legacies and by clauses 4 and 5 bequeathed certain annuities, by clause 6 proceeded as follows : " As to all the rest residue "and remainder of my real and personal estates, whatsoever "and wheresoever situate and over which I have any power "of appointment, I devise and bequeath the same equally "among the following persons " ; five persons are then named. By clause 7 the testatrix directed that all duties payable on her death should be discharged out of her estate. The testatrix made two codicils to her will and thereby gave certain pecuniary legacies which she expressed to be free of duty. She died on June 20, 1936. Two of the five persons named as residuary legatees predeceased her, so that two fifth shares of residue were undisposed of and devolve as on an intestacy. Such shares are " Property undisposed of by

(1) [1930] 1 Ch. 47.
(2) [1929] 1 Ch. 726.
(3) [1931] 1 Ch. 202.
(4) [1929] 1 Ch. 722.

SIMONDS J.
1938
SANGER, *In re.*
TAYLOR *v.* NORTH.

will" within clause I of Part II. of the First Schedule to the Administration of Estates Act, 1925, and therefore under s. 34, sub-s. 3, of the Act are primarily applicable "subject "to the provisions contained in the will" towards the discharge of the funeral testamentary and administration expenses and debts and liabilities of the testatrix.

The question raised in this summons is whether there are any provisions in the will which alter the order of administration which would otherwise apply under the Act. In form the summons asks: "Whether all or any and which of the "following payments to be made in administering the "testatrix's estate are chargeable to the two fifth shares of "the testatrix's estate as to which she died intestate, or are "chargeable to the testatrix's estate as a whole before division "thereof into shares—namely, (*a*) the pecuniary legacies "bequeathed by the said will and codicils; (*b*) the estate duty "payable on the testatrix's estate (other than estate duty "payable on the testatrix's real estate); (*c*) the legacy duties "payable on the said legacies; and (*d*) the testatrix's funeral "and testamentary expenses (other than estate duty) and "administration expenses and debts." But the argument before me was directed only to items (*b*) and (*c*), it being conceded that there was no provision of the will affecting the primary liability of the undisposed of shares to payment of the items (*a*) and (*d*). This means that on the direction contained in clause 7 of the will, and on that alone, reliance is placed by those who argue in favour of some other order than that prescribed by the Act. Whether or not the argument is well founded must depend on the construction of the language of this particular will, but I cannot ignore the cases in which, since the coming into operation of the Administration of Estates Act, 1925, a similar question has been considered, and I therefore propose in the first place briefly to examine those cases.

In *In re Lamb* (1), according to the statement of the will by Eve J., the testator, after appointing executors and directing that all his just debts, funeral and testamentary

(1) [1929] 1 Ch. 722.

SIMONDS J.
1938
SANGER, *In re.*
TAYLOR *v.* NORTH.

expenses should be paid by them as soon as possible after his decease, and making a specific devise and bequeathing several pecuniary legacies, directed that the rest, residue and remainder, real and personal whatsoever and wheresoever, should be equally divided between his brother, his cousin and his two nephews therein mentioned. The testator's brother predeceased him, and therefore one fourth share of the residue lapsed. On this will the substantial question for Eve J.'s decision was whether the lapsed share of residue was property of the deceased undisposed of by will within clause 1 of Part II. of the First Schedule to the Act. He decided that it was, and his decision, which was affirmed in a later case in the Court of Appeal, is open to revision only in the highest tribunal. But the learned judge went on to say: " In the present case I can see nothing to exclude the "application of the statutory order of application," that is to say, a direction to executors to pay debts and funeral and testamentary expenses as soon as possible after his decease and a bequest of pecuniary legacies followed by a disposition of the rest residue and remainder of the estate did not amount to a provision in the will which would affect the statutory order.

In *In re Petty* (1) Astbury J. considered and distinguished the case last cited. There the testator, by clause 17 of his will, devised and bequeathed his residuary real and personal estate to his trustees on trust for sale and conversion and out of the proceeds to pay his funeral and testamentary expenses except as therein mentioned, and debts and the pecuniary legacies bequeathed by the will or any codicil thereto and all duties payable in respect of all annuities, legacies and other gifts, given free from duty, and by clause 18 the testator directed his trustees to stand possessed of the residue of the said moneys in trust to divide the same into equal parts and to pay one equal half part to his wife and to hold the other half part on trust for certain persons therein named. The testator's wife predeceased him, and the same question arose as in *In re Lamb* (2)—whether the testator's funeral and

(1) [1929] 1 Ch. 726.

(2) [1929] 1 Ch. 722.

testamentary expenses, etc., were payable out of the wife's share which lapsed, or there was some provision of the will which affected the statutory order. On this point Astbury J. said (1): "I cannot believe that the statute intended to interfere "with the testator's right to deal with his own estate as he "liked. Here it is plain that he created a mixed fund for "the payment of funeral and testamentary expenses debts "and legacies, and there was no undisposed of moiety of the "balance of residue until those expenses and debts were "ascertained and paid. In those circumstances the estate "must be administered according to the testator's directions, "and the expenses and debts are not thrown primarily on the "lapsed moiety." Both in the passage cited and in a subsequent passage in his judgment Astbury J. finds in the express creation of a mixed trust with a direction to pay thereout funeral and testamentary expenses, etc., a provision which overrides the statutory order of application.

In *In re Atkinson* (2) a similar question came before Clauson J. In that case the testator devised his real estate to his brother therein named and bequeathed all his personal estate to trustees on trust for sale and conversion, and on trust that they should, out of the moneys produced by such sale and conversion, and any ready money, pay his funeral and testamentary expenses, etc., and stand possessed of the income of the moneys on trust for the several persons therein mentioned. The testator's brother, Edwin, predeceased him, so that the real estate was undisposed of, and the question was whether, being property of the deceased undisposed of by will, it must be first applied in the payment of funeral and testamentary expenses, etc., or there was some provision in the will to the contrary. Clauson J., following *In re Petty* (3), and distinguishing *In re Lamb* (4), said (5): "Here the will "contains a clear direction to the trustees to convert the "personal estate and out of the moneys produced by such "conversion to pay his funeral and testamentary expenses

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(1) [1929] 1 Ch. 722, 730.
(2) [1930] 1 Ch. 47.
(3) [1929] 1 Ch. 726.
(4) [1929] 1 Ch. 722.
(5) [1930] 1 Ch. 51.

"and debts: until that provision is worked out there is no "necessity to have recourse to Part II. of the First Schedule "to the Act." The statutory order of application was therefore ousted by the provisions of the will and did not apply in that case.

In *In re Kempthorne* (1) the testator devised to his brother all his freehold and copyhold property and further provided: "As to all my leasehold property, and all my personal estate "and effects, including my stocks and shares, and all money "due to me on debentures and mortgages, of or to which "I shall be possessed or entitled at the time of my death, "subject to and after payment of my funeral and testamentary "expenses and debts and the legacies bequeathed by this my "will or any codicil hereto, and the duty on any legacies "bequeathed free of duty, the same shall be divided into "seven equal parts, and I bequeath the same as follows." The bequests were to certain persons of whom some predeceased him, so that their shares lapsed. It appears that the will did not contain an express trust for sale. Maugham J. (as he then was), on the consideration of this will, came to the conclusion that the statutory order of application prevailed. To some extent no doubt he relied on certain provisions of Part II. of the First Schedule to the Act, which the Court of Appeal considered not to be material. The Court of Appeal reversed his decision, holding that the provisions of the will altered the statutory order. Lawrence L.J., while expressing himself as unconvinced as to the correctness of the decision in *In re Lamb* (2), distinguished that case, saying that the provision there as to the debts, funeral and testamentary expenses amounted, in effect, to nothing more than a direction to pay them in the due course of administration, and that there was no such express provision as occurred in the will then under consideration. Russell L.J. said that the first thing to do was to ascertain whether the testator's will contained any and what provisions relating to the discharge of his funeral, testamentary, and administration expenses, debts, and liabilities, and that the testator in that

(1) [1930] 1 Ch. 268, 269.

(2) [1929] 1 Ch. 722.

case had made, as it appeared to him, a particularly clear provision by his will. The Lord Justice did not refer to *In re Lamb.* (1) The difference between the two cases appears to be that in *In re Lamb* (1) the testator directed his executors to pay his debts, funeral and testamentary expenses, etc., without specifying out of what estate or fund the payment was to be made, and bequeathed legacies, and then disposed of the rest, residue, and remainder of his estate, while in *In re Kempthorne* (2) the testator directed that his estate should, after payment thereout of his funeral and testamentary expenses, etc., be divided into a number of equal parts which he bequeathed as therein mentioned. In *In re Kempthorne* (2) there was an overriding provision, in *In re Lamb* (1) there was not.

Next comes *In re Tong* (3), in which both Clauson J. and the Court of Appeal held that the statutory order prevailed with regard to the only items on which a decision was sought. In that case the testator, after directing his executors to pay all legacies free of estate or legacy duty, and directing that any duty of any kind which might become payable on any gifts which he might make on his decease should be paid out of his estate, bequeathed certain legacies and annuities and certain specific bequests, and then directed his executors to collect the income from the remainder of his estate and pay 75 per cent. of it to his sister during her life and subject thereto to dispose of the estate as therein mentioned. The gift to the testator's sister lapsed because the will had been attested by her husband, and the question was whether the undisposed of share of income was the primary fund for the discharge of funeral, testamentary, and administration expenses, etc., other than the duties with regard to which specific directions had been given.

It is noteworthy that the question was not there raised whether the last named duties should be paid out of the undisposed of share. It appears to have been assumed in both Courts that they were not so payable, though there was

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(1) [1929] 1 Ch. 722.

(2) [1930] 1 Ch. 268.

(3) [1930] 2 Ch. 400; [1931] 1 Ch. 202 (C. A.).

SIMONDS J.

1938

SANGER, *In re.*

TAYLOR *v.* NORTH.

nothing to displace the statutory order with regard to them except the direction for payment of them out of the estate and a disposition of the remainder of the estate. Clauson J. said (1): " In this will I find no reference to funeral expenses "or to debts or liabilities; there is a direction to pay duty "on gifts made by the testator in his lifetime, but those would "not be debts or liabilities of the testator, but of the recipients "of the gifts, and the direction amounts to a legacy to those "recipients of a sum equal to the duty which they have "incurred. I find a direction to pay all legacies free of estate "duty, and I think I may fairly construe this as a direction "that all estate duty shall be paid out of his estate. When "I come to the final gifts I find a disposition of the ' remainder "' of my estate.' This I construe, in view of the preceding "reference to estate duty, as a direction to pay the estate "duty and the legacies out of the general estate before ascertaining the fund which is the subject-matter of the final "gift; but I can find no direction dealing with funeral, "testamentary and administration expenses, debts and "liabilities, other than and except this estate duty. In order "to ascertain how these expenses, debts and liabilities must "be met I must, by reason of s. 34, sub-s. 3, of the Act turn "to Part II. of the First Schedule."

The same view was taken in the Court of Appeal. To Lord Hanworth M.R. it appeared that the rule of "expressio unius est exclusio alterius" must apply. The testator had imposed specific duties on the executors; the word " remainder " could not be treated as an indication that not only the specific duties and liabilities, but also all other duties, expenses, and liabilities were to be paid out of residue. Romer L.J. referred to the specific directions to the executors, but failed to find anything in the will amounting to an indication of the testator's intention that the funeral and testamentary expenses and debts generally should be paid in any other than the statutory order. He then used these words (2): " Even if the testator had directed his trustees to "pay all his funeral and testamentary expenses and debts

(1) [1930] 2 Ch. 405.

(2) [1931] 1 Ch. 212.

"and then given the remainder of his estate on certain trusts, "I should still have hesitated to say that this amounted to "an indication that the expenses and debts were to be paid "in any other order out of the assets than that provided for "in the First Schedule. The truth of the matter is that "there is nothing in this Act which prevents or is intended "to prevent the executors from paying expenses, debts and "liabilities out of the first assets coming to their hands "available for the purpose; and Part II. of the First Schedule "really only deals with the ultimate adjustment of the burden "as between the parties becoming entitled to the testator's "estate. Therefore the use of such a word as 'remainder' "does not seem to me to make any difference. Such words "throw no light on how as between the persons having "beneficial interests in the remainder the liability for expenses "and debts is to be apportioned." Eve J. agreed, saying that he could not help thinking that, by indicating certain respects in which the statutory order of application of the assets was to be departed from, the testator indicated clearly that, except in respect of the payment of those particular liabilities, the scheduled order of application was to be adhered to. I have cited at length a passage from the judgment of Romer L.J., because though it might in that case be regarded as dictum, it was approved, and indeed formed the basis of the judgment of Lord Hanworth M.R. in the next and last case to which I must refer: *In re Worthington.* (1)

In that case the testatrix, after appointing an executor and bequeathing a number of pecuniary legacies, etc., free of legacy duty, gave, devised and bequeathed all the remainder of her estate both real and personal to two persons in equal shares. One of them predeceased the testatrix and the familiar question arose whether the debts, funeral and testamentary expenses and the legacies should, in the first place, be paid out of the lapsed share. Bennett J. held (1.) that the debts, funeral and testamentary expenses were primarily payable out of the lapsed share, but (2.) that the legacies and

(1) [1933] Ch. 771.

duties thereon were payable out of the general estate before any shares of residue were ascertained. On the second point his decision was reversed by the Court of Appeal. Lord Hanworth M.R. said (1): "But the provisions of the statute "indicate that unless there is some provision in the will "which negatives the prescribed order of administration, that "order of administration must apply both to legacies and "debts. The learned judge seems to have thought that "because of the specific reference to legacies in the will there "was an indication of an intention that the statutory order "of administration should not apply to them. But, after all, "if legacies are given by a will, there must be a specific reference "to them, and I do not see how that can be sufficient to alter "the statutory order of administration." He then referred, with approval, to the passage from Romer L.J.'s judgment in *In re Tong* (2), which I have read. Lawrence L.J. concurred, expressing his agreement with the cited passage, as did Romer L.J.

I do not find it easy to reconcile the several cases which I have cited. The question being whether there is a provision in the will which displaces the statutory order, I see no difference in that regard as between (*a*) a bequest of legacies simpliciter and (*b*) a direction to executors to pay legacies, nor between (*a*) a direction to pay legacies and (*b*) a direction to pay debts. Yet in *In re Worthington* (3) the bequest of legacies followed by a disposition of the remainder of the estate was inadequate to displace the statutory order, while in *In re Tong* (2) it appears to have been conceded that, with regard to those duties as to which specific directions for payment were given, the statutory order was displaced, and the specific directions as to some items of payment were made the substantial ground for upholding the statutory order with regard to other payments.

Again, I find it difficult to distinguish between, on the one hand, a gift of property subject to and after payment of

(1) [1933] Ch. 775.
(2) [1930] 2 Ch. 400; [1931] 1 Ch. 202 (C. A.).
(3) [1933] Ch. 771.

funeral and testamentary expenses or debts or legacies and, on the other hand, a direction to pay funeral and testamentary expenses or debts or legacies followed by a gift of residue. Yet in *In re Kempthorne* (1) the statutory order was displaced by a direction of the former kind, and in *In re Tong* (2) and *In re Worthington* (3) it was not displaced by a direction of the latter kind. It is perhaps significant that at least one member of the Court which decided *In re Kempthorne* (1) appeared to doubt the correctness of the decision in *In re Lamb* (4), even on the assumption which must now be accepted that a lapsed share of residue is "property of the deceased "undisposed of by will," but the correctness of that decision could not be questioned in the light of the decision of the Court of Appeal in *In re Worthington.* (3)

In the present case I have a bequest of legacies and annuities, without any direction for the payment either of them or of any testamentary expenses and debts, followed by a gift of residue. If the will ended there, the case would be so near *In re Worthington* (3) that I should follow that case without question, but the will then contains the direction that all duties payable on the testator's death shall be payable out of his estate. If I gave to that direction the effect which was given to a substantially similar direction in *In re Tong* (2) I should have to say that it was a provision which overrides the statutory order. I do not think that I can do so, for in *In re Tong* (2) the actual decision was only with regard to those items as to which the testator had given no direction. It did not expressly cover the items as to which a specific direction was given, and though in all the judgments in both Courts that specific direction was referred to and in greater or less degree made a ground for not displacing the order with regard to the items as to which no specific direction was given, I cannot but think that, if the question had been expressly raised as to the specific items, the Court must, consistently with the observations of Romer L.J., which

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(1) [1930] 1 Ch. 268.

(2) [1930] 2 Ch. 400; [1931] 1 Ch. 202 (C. A.).

(3) [1933] Ch. 771.

(4) [1929] 1 Ch. 722.

I have cited at length, and the later decision in *In re Worthington* (1), have held that with regard to those items also the statutory order was not displaced.

In re Kempthorne (2) may be distinguished on the ground, perhaps not altogether satisfactory, that a different effect may be given to a testator's language according to whether he (*a*) directs payment of debts and distribution of residue, or (*b*) directs distribution of his estate subject to and after payment of debts.

The present case falls within the former, not the latter, category. In the result, the conclusion to which I come is that the statutory order is applicable, and that the undisposed of share of residue is the fund which must first be used in discharge of all the items of payment mentioned in the summons.

Solicitors: *Taylor & Humbert; Wilkinson, Howlett & Moorhouse.*

(1) [1933] Ch. 771.

(2) [1930] 1 Ch. 268.

H. L. L.

In re A DEBTOR.

C. A.
1938
Oct. 21.

[441 of 1938.]

Bankruptcy—Debtor resident abroad—Service of petition on debtor in a sealed envelope—Service not sufficient—Petition dismissed by Registrar—Exercise of Registrar's discretion—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 5, *sub-ss.* 1, 3—*Bankruptcy Rules,* 1915, *rr.* 155, 156, 158—*Order* IX., *r.* 2.

Where a petition in bankruptcy is served on a debtor resident abroad in a sealed envelope, his attention must be called to the nature of the contents of the envelope at the time when the delivery is made.

Where service of a petition in bankruptcy is bad owing to a technical error, the Registrar ought, on the matter being brought to his attention at the hearing of the petition, to fix a new date for its hearing in order to give the creditor an opportunity to effect a good service.

Appeal against an order of a Registrar in bankruptcy dismissing a petition on the ground that it was not properly served. The petition, which was founded upon failure to comply with a bankruptcy notice, was presented on June 2, 1938, and, by the order endorsed upon it, July 8 was fixed as the date of hearing. The debtor was at the time resident in Paris. On June 8 an order was made giving to the petitioner liberty to serve a sealed copy of the petition, together with a sealed copy of the order, personally on the debtor at an address mentioned in Paris or elsewhere in France. The order then proceeded to direct that the petition should be heard on July 8. On June 25 a person employed by a firm of detectives in Paris went to the address named in the order of June 8 bearing a sealed envelope, addressed to the debtor by name, but not containing upon its outside any reference to its contents. Its contents were in fact a sealed copy of the petition and a sealed copy of the order of June 8. The debtor's brother then wrote to the debtor's solicitors in London a letter stating that the sealed envelope had not been delivered to the debtor himself. The matter then came before the Registrar on July 8, and he gave his decision as follows: "I am not satisfied there is good personal

C. A.
1938
A DEBTOR,
In re.

"service, for the reason that the documents were delivered "in a sealed envelope and no indication of their nature was "stated. I cannot accept the debtor's brother's evidence, "as his story to-day is wholly inconsistent with the story "contained in the letter of June 25. But for the fact that "the documents were delivered in a sealed envelope I should "have been satisfied that the debtor had been personally "served. I dismiss the petition with costs." The petitioner appealed against that decision on the following grounds: first, that on the facts there was good service; secondly, assuming there was not good service, the Registrar, instead of dismissing the petition, ought to have adjourned it and fixed a different return; and, thirdly, that in any event the petitioner ought not to have been ordered to pay costs, particularly in view of the untrue evidence that the debtor's witness had given.

J. B. Blagden for appellant. The Registrar only considered the question of whether the service of the petition was effective or not. He ought to have exercised his discretion in favour of the petitioner by adjourning the hearing of the petition to such a date as would allow the petitioner time to serve the petition in an effective manner. Although it is necessary, when serving a writ enclosed in an envelope, to call the attention of the person served to the contents of the envelope (see *Banque Russe et Française* v. *Clark* (1)), a debtor is not entitled to see the original petition in bankruptcy. Rule 155 of the Bankruptcy Rules, 1915, deals with the delivery of the petition. There is no doubt here that the sealed envelope was delivered to the debtor, and, although at the moment of delivery he did not know the contents of the envelope, he knew when he opened it. He knew at the time that bankruptcy proceedings were being taken against him.

When a petition is not properly served, the Registrar, exercising the discretion given to him by s. 5, sub-s. 1, of the Bankruptcy Act, 1914, invariably adjourns the hearing

(1) [1894] W. N. 203.

of the petition to allow a good service to be made. The Registrar appears to have forgotten this generally accepted rule.

Serjeant Sullivan K.C. and *G. F. Kingham* for respondent. Under s. 5, sub-ss. 2 and 3, the Registrar has a discretion, and the Court ought not to interfere with the exercise of his discretion. The matter was argued before him and he refused to fix a new date. This order ought to stand.

SIR WILFRID GREENE M.R. This appeal raises a point of some general interest in relation to the service of bankruptcy petitions. The appeal is by a petitioning creditor, and he appeals against an order of Mr. Registrar Kean who, on July 8 of this year, dismissed the petition with costs, the ground upon which he dismissed it being that, as he found, the petition was not properly served.

The petition, which is founded upon failure to comply with a bankruptcy notice, was presented on June 2 and, by the order endorsed upon it in the usual form, July 8 was fixed as the date of hearing. As appears on the face of the petition, the debtor was at the time resident in Paris. On June 8, 1938, an order was made giving to the petitioner liberty to serve a sealed copy of the petition together with a sealed copy of this order personally on the debtor at an address mentioned in Paris or elsewhere in France. I have quoted the words of the order, which is, of course, in common form. The order then proceeded to direct that the petition be heard on July 8, 1938, at 11 o'clock in the forenoon.

It appears that on June 25 a person employed by a firm of detectives in Paris went to the address named in the order for service out of the jurisdiction bearing an envelope sealed, addressed to the debtor by name, but not containing upon its outside any reference to its contents. Its contents in fact were a sealed copy of the petition and a sealed copy of the order for service out of the jurisdiction dated June 8.

The next fact to which I need refer is this. In due course of post after June 25, 1938, the debtor's solicitors in London received a letter signed by the debtor's brother enclosing the envelope in which the documents had been handed in together

C. A.
1938
A DEBTOR, *In re.*
Sir Wilfrid Greene M.R.

with its contents, and the envelope was open. The letter stated that the envelope had been delivered to one of the writer's clients that morning and that that client accepted it. The writer then said that, the letter being for his brother who was not present there, and concerning his legal business, he thought he was right in sending it to the solicitors. The solicitors informed the Registrar of what had happened and suggested that, in their view, there had not been proper service. After some further correspondence, on July 8 the petition came on for hearing. Evidence was given by the person who had delivered the envelope at the address in Paris and also by the debtor's brother who had sent the letter of June 25, 1938. I need not go into the details of that evidence, but I may say this, that the debtor's brother put up a case entirely different from what he had stated in his letter—namely, that it was to himself that the envelope had been delivered. The learned Registrar refused to accept the evidence of the debtor's brother, and his decision was in these words: "I am not satisfied there is good personal service "for the reason that the documents were delivered in a sealed "envelope and no indication of their nature was stated. I "cannot accept the debtor's brother's evidence as his story "to-day is wholly inconsistent with the story contained in "the letter of June 25. But for the fact that the documents "were delivered in a sealed envelope I should have been "satisfied that the debtor has been personally served. I "dismiss the petition with costs." It seems to me that that finding necessarily involves a finding that the person to whom the envelope was handed was the debtor himself, because what it means is that, if the documents had been delivered outside the envelope instead of inside, the debtor would have been personally served, and that must mean (and there was ample evidence upon which the Registrar could so find) that the person to whom the envelope was handed was the debtor himself.

In those circumstances, Mr. Blagden, on behalf of the appellant, raises three matters. First of all, he says that on the facts there was good service; secondly, he says that, assuming that is wrong, the Registrar instead of dismissing the petition ought to have adjourned it and fixed a different return date; and, thirdly, that in any event the petitioner ought not to have been ordered to pay costs, particularly in view of the untrue evidence that the debtor's witness had given.

The only matter of general interest is the first point. Before I deal quite briefly, as I shall, with that point, I must refer to the statutory provisions with regard to service of a bankruptcy petition. Sect. 5, sub-s. 1, of the Bankruptcy Act provides as follows: "A creditor's petition shall be "verified by affidavit of the creditor, or of some person on "his behalf having knowledge of the facts, and served in the "prescribed manner." Therefore there is, as one would expect to find, an express direction for service. The manner of service is prescribed by the Bankruptcy Rules, 1915, beginning with r. 155; that is the rule which deals with personal service of the petition, that is in the normal case: "A creditor's petition shall be normally served by delivering "to the debtor a sealed copy of the filed petition." Rule 156 provides that the service shall be "upon the debtor by an "officer or bailiff of the Court or by the creditor or his solicitor, "or by some person in their employ," and there is a provision for substituted service in suitable cases. Rule 158 provides: "Where a debtor petitioned against is not in England, the "Court may order service to be made within such time and "in such manner and form as it shall think fit." One thing I think is pretty clear when one looks at those Rules and remembers the class of subject-matter—namely, service of process, which is always regarded as being a matter of great strictness, that the direction, and the governing direction, is for service. Delivery is the manner of service, but the question is, what does "delivery" in that context mean? Mr. Blagden wishes us to say, in the first place (and I do not think he pressed us very hard), that by delivering the envelope which physically contained these documents to the debtor in person service within the rule was duly effected, that there was physical delivery to the person in question. I am quite unable to construe the section and the Rules in any such sense as that, because it appears to me that, on those assumed facts, what is after all the essential thing in service cannot have been complied with, the essential thing being that the documents served shall be brought to the personal knowledge of the person whose concern it is. In the case of a writ, of course, a writ is a command in the King's name, and in order that that command may be effectively given service of the writ, or a copy of the writ, or notice of the writ if out of the jurisdiction, is required. In the case of a writ it could not be suggested, I venture to think, that mere proof of delivery of a sealed envelope containing the copy of the writ, or notice of the writ, would be sufficient service. Mr. Blagden suggested that in the case of a bankruptcy petition the rule is not so strict, because whereas in the case of a writ the rule for service is as follows : " When service is required "the writ shall, wherever it is practicable, be served in the "manner in which personal service is now made " (that is Order IX., r. 2), in the case of a bankruptcy petition the rule is satisfied by mere physical delivery even if the documents to be served are delivered in a sealed envelope. In the case of a writ, of course, the method of serving a writ was well known and fixed by a practice of generations and, indeed, centuries. This is what is said in the Annual Practice at p. 61 of the current edition : "A copy of the writ should be delivered to "and left with the person to be served. If he refuses to take it, "it must be left with him, not taken away. If the defendant "is informed of the nature of the process, and the copy thrown "down, that, it seems, would do," and so forth. Then it says : "The original writ must at the same time be shown to him, "if he requires it, otherwise all the proceedings founded on "the writ may be set aside." It is no exaggeration to say that the practice in regard to writs and the requirements of the law in regard to the service of writs are, and have always been, regarded as matters strictissimi juris. In the case of the service of a bankruptcy petition, I can see nothing in the section and Rules which can fairly be construed as relaxing the strict requirements which are to be found in the case of the service of writs and other documents under the Rules of the Supreme Court. I therefore hold that Mr. Blagden's first point, namely, that mere proof of delivery of the documents in a sealed envelope without more would be sufficient, fails.

Then Mr. Blagden says that on the facts of this case the inference ought to be drawn that the contents of the document actually came to the knowledge of the debtor, and in support of that he points to two circumstances, (1.) that the envelope was opened, and (2.) that it was addressed to the debtor, and from the combination of those two circumstances he says that it ought to be inferred that the envelope was opened by the person to whom it was addressed and that, having opened the envelope, he examined and discovered the nature of its contents. Whatever inferences may be drawn from other matters, I find it quite impossible to draw inferences of that kind in a matter of so strict a nature as service. It would be intolerable, and would lead to the gravest injustice, if a litigant who was desirous of bringing his opponent before the Court by proper process could satisfy the requirements of the law as to service by proving facts such as those and asking the Court thereon to draw an inference as to the crucial fact having happened, the crucial fact being the coming of the document into the hand of the person to be served in such manner that the nature of it is brought to his mind. Unless it comes to his hand in that way, and that is established beyond any possibility of doubt, it seems to me that the Court would be departing from the most salutary view of these matters if it indulged in inferences based on evidence which might be quite strong for other purposes but which, for a purpose such as this, in my judgment ought not to be drawn. I am not laying down any general rule as to the circumstances in which it may be possible to prove service notwithstanding delivery in a sealed envelope. For example, if the envelope were opened by the addressee in the presence of the server and the contents inspected, that would be one case; there may be other borderline cases, and I do not wish to prejudice any future case on its facts. What I am saying is this: in a case of this kind, the evidence being such as it is, the Court ought not, and will not, draw any inference as to whether or not the document came to the notice of the person to whom it was addressed. The substantial point therefore fails.

There remain only the other two points. The learned Registrar, acting under s. 5, sub-s. 3, of the 1914 Act, dismissed the petition. That section provides: "If the "court is not satisfied with" among other matters, "the "service of the petition, or is satisfied . . . . that for other "sufficient cause no order ought to be made, the court may "dismiss the petition." In the present case, as I say, the Registrar dismissed the petition, but I cannot think that in doing so he can have had properly before his mind the fact that, on the facts of this case, the debtor has been fortunate enough to escape on a matter of great strictness and also that the result of dismissing the petition may be to work a serious injustice. This is a case where a slip was made in the matter of service, and it seems to me that the Registrar ought not to have allowed that to lead to a dismissal of the petition, but ought to have given facilities for remedying it. That could quite easily have been done by fixing a different date for the hearing of the petition, which would have meant that both the order endorsed on the petition and the order for service out of the jurisdiction in so far as it deals with the date of hearing would have to be amended by subsequent order, and, that date having been fixed, the petitioning creditor, if he could successfully do so, would be entitled to serve the debtor. That seems to me to be the course which he ought, in order to do justice, to have followed, and I cannot see any adequate ground for dealing with the matter in the way that he did.

The last point remains, and that is the question of costs. Mr. Blagden wishes us to say that the learned Registrar in any event ought not to have ordered the costs of the hearing before him to be paid by the petitioning creditor. In my judgment, that is an order with which we cannot possibly interfere. The petitioning creditor was responsible for proceedings taking place at a time when the necessary foundation for them was absent, namely service, and I can see no reason why he should not have been ordered to pay the costs.

Accordingly, the order of the Court will be that the order of the Registrar be discharged, that the petition be referred back to him in order that a new date may be fixed and the consequential order made providing that that date is to be the effective date notwithstanding what is said in the endorsement on the petition and in the order for service out of the jurisdiction; that, of course, will involve the making of a new corrected endorsement on the petition itself. So far as the costs of this appeal are concerned, there will be no costs of the appeal on either side.

I should have added when I said the order of the Registrar will be discharged, save as regards costs; his order as to costs will stand. There will have to be a new order for service out of the jurisdiction and, of course, it will be a sealed copy of that order which will be served with the sealed copy of the petition.

Scott L.J. I agree.

Clauson L.J. I agree.

Solicitor for appellant: *L. A. Hart.*
Solicitors for respondent: *Bowkers.*

P. J. B.

LORDS JUSTICES SITTING IN LUNACY.

1938

Oct. 17, 31; Nov. 1.

In re T. R. M. (A PERSON OF UNSOUND MIND).

(53 VICT. c. 5, AND AMENDING ACTS.)

Person of unsound mind—Old aged pensioner—Maintained in a rate-aided institution—Order in Lunacy—Public Assistance Officer of County Council appointed receiver of moneys derived from old age pension — Charge on patient's pension — Maintenance — Local authority's jurisdiction over old age pension—Whether old age pension applicable in aid of local rates—Widows', Orphans' and Old Age Contributory Pensions Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 33), *s.* 21, *sub-s.* 1; *s.* 32, *sub-s.* 2 (*f*); *Third Schedule.*

M., a person of unsound mind and an old age pensioner with no means of his own, was being maintained by a local authority in a rate-aided institution. By an order of the Assistant Master in Lunacy the public assistance officer of the local authority (a county council) was appointed receiver of the old age pension on behalf of the patient. The order gave the receiver power to give a good discharge for pensions belonging to the patient and to lodge in Court all sums so received by him. By the lodgment schedule to the order all such sums were to be accumulated. A paragraph in the order gave a charge to the county council on the money for the time being in Court for any sums then due and to become due to the council in respect of the patient's maintenance and continued: "such charge is not to be enforceable (except "with leave of the Master (in Lunacy)) until the death of the "patient, and is to be subject to any order of the Master for the "application for the benefit of the patient of the property "charged, but before any such order is made notice is to be "given to the chargees."

The receiver, having taken the view that the accumulations of income from the old age pension should be applied for the patient's maintenance instead of as directed in the order, appealed to the Lords Justices sitting in Lunacy, and in his notice of appeal asked that the order might be varied by substituting a paragraph that the net income of the patient should be allowed for his maintenance in lieu of those paragraphs in the order mentioned above:—

Held, that the Assistant Master in Lunacy had ample jurisdiction to make the order appealed from, under which, while preserving the paramount interests of the person of unsound mind, the right of the local authority to reimburse itself for moneys expended on the patient for maintenance out of the patient's property was preserved. Such an order was one that not only could have been properly made but was properly made, and it effected in a proper manner a just compromise between the rights of the local authority and the interests of the patient. It was a wise and just order and one that should not be interfered with.

Appeal dismissed.

The statutory provisions for the payment of old age pensions (namely, the Widows', Orphans' and Old Age Contributory

Pensions Act, 1936) are not intended to provide for payment of the pension to a local authority in aid of the local rates either in the case of an old age pensioner of unsound mind or one not of unsound mind, and in the case of a person of unsound mind the sums received in respect of pension are the patient's own property and fall to be dealt with under the ordinary discretionary jurisdiction of the Court in Lunacy.

THIS was an appeal by the Public Assistance Officer to the County Council of Lincoln (Parts of Lindsey) against an order made by the Assistant Master in Lunacy dated February 24, 1938. By the order the appellant was appointed a receiver in the case of one T. R. M., an aged person of unsound mind and an inmate of a rate-aided institution. The patient (an old aged pensioner) had no private means of his own. By the order in question, para. 2, the appellant receiver was given power to give a good discharge for any property, and particularly pensions, belonging to the patient. By para. 3 of the order the receiver was directed to lodge in Court all sums received by him under para. 2, and by the lodgment schedule the money so lodged in Court was to be accumulated. Para. 4 gave to the county council a charge on the money for the time being in Court for any sums then due and future sums becoming due to the county council in respect of the patient's maintenance, and provided that the charge "is not "to be enforceable (except with the leave of the Master) until "the death of the patient, and is to be subject to any order of "the Master for the application for the benefit of the patient "of the property charged, but before any such order is made "notice is to be given to the chargees." By para. 5 the fund was to be dealt with as directed in the lodgment schedule above referred to.

The question was raised by the appellant whether in place of the directions for payment into Court and accumulation of the money received from time to time in respect of the patient's old age pension, the order should not have provided that these sums should be applied for maintenance. In his notice of appeal he asked that the order might be varied by paras. 3, 4 and 5 and the lodgment schedule to the said order being deleted and the following new para. 3 being inserted therein: "The net income of the patient is allowed "for his maintenance."

T. A. C. Burgess for the appellant. The receiver ought to be authorized to pay to the local authority towards the expenses of maintenance the part of the old age pension not applied for providing the patient with extra comforts. The pension is payable under the Widows', Orphans' and Old Age Contributory Pensions Act, 1936, and if a receiver had not been appointed to get in the old age pension, it would, by virtue of s. 21, sub-s. 1 (*b*), of the Act, have ceased to be recoverable after three months had passed without any one claiming it. The pension here is payable under s. 8, and the pension continued to be payable after the pensioner was being maintained in an Institute under the provisions of the Third Schedule to the Act.

[SIR WILFRID GREENE M.R. The question is whether there was anything to found a charging order upon.]

The Lunacy Act, 1890, s. 299, deals with the position in regard to persons of unsound mind, and apart from statute there is a common law liability for the cost of maintenance. The section shows that the local authority is expected to take steps to recoup itself, and s. 20 of the Poor Law Act, 1930, gives a right to recover twelve months' maintenance out of any property belonging to a person in receipt of relief. Further, apart from this limited right, the relation of debtor and creditor is created in such a case at common law. There is an implied liability for the expenses of necessaries supplied to a person unable owing to any disability to contract for himself: *Guardians of the West Ham Union* v. *Pearson* (1); *In re Clabbon.* (2) There is, however, an implied obligation to repay money provided for necessaries to a pauper having a capacity to contract: *Pontypridd Union* (*Guardians of*) v. *Drew.* (3)

[SIR WILFRID GREENE M.R. The difficulty in the case of a person of unsound mind is to reconcile the common law liability to repay with the statutory obligation to maintain.]

(1) (1890) 62 L. T. 638.
(2) [1904] 2 Ch. 465.
(3) [1927] 1 K. B. 214.

There have been many cases in which charging orders have been made. See, however, *Wandsworth Union* (*Guardians of*) v. *Worthington* (1), where a receiver was appointed and directed to apply property for maintenance, including all arrears. The Lunacy Act, 1890, s. 300, recognized the right of the guardians to be recouped for expenses incurred in regard to a person of unsound mind. The liability for expenses of maintenance is first dealt with in ss. 286 and 287 of the Act of 1890, and ss. 13, 14 and 16 show how the Unions became responsible for persons of unsound mind who became paupers.

[SIR WILFRID GREENE M.R. referred to Heywood and Massey's Lunacy Practice, 5th ed., p. 298, where it was stated that an order charging a fund was approved by the Court of Appeal in an unreported case, *In re Jeanes.*]

The point in question in the case now before the Court was not argued in that case. [He referred also to *In re Newbegin's Estate* (2); *In re Tye.* (3)]

Theodore F. Turner for the Official Solicitor. The order in question is one that should be upheld, it has been made in a large number of cases similar to the one now before the Court, and is a very convenient one to make; it is for the benefit both of the patient and the local authority. Under this order a fund can be accumulated in Court for the benefit of the patient and—should he recover—he could have a small sum to begin life again on his discharge from the rate-aided institution. A local authority cannot sequestrate the sums derived from an old age pension in the case of a patient in a rate-aided institution and repay themselves what they expend on the maintenance of a person of unsound mind. It is really a matter falling within the ordinary jurisdiction of the Court. The Acts relating to lunacy do not touch on this question. It is one for the Court's discretion.

T. A. C. Burgess in reply. If statutory authority is needed in support of the contention put forward on behalf of the appellant, see s. 20 of the Poor Law Act, 1930, sub-s. 1. The appeal should be allowed.

(1) [1906] 1 K. B. 420.
(2) (1887) 36 Ch. D. 477.
(3) [1900] 1 Ch. 249.

LORDS JUSTICES SITTING IN LUNACY.
1938
T. R. M., *In re.*

SIR WILFRID GREENE M.R. This is an appeal by the Public Assistance Officer to the County Council of Lincoln (Parts of Lindsey) against an order made by the Assistant Master in Lunacy dated February 24, 1938. Under that order the appellant was appointed receiver in the case of a person of unsound mind who was an inmate of a rate-aided institution. That person, the patient, had no means of his own. It appears that he had relatives, no one of whom was desirous of being appointed receiver. Accordingly an application was made for the appointment of the public assistance officer as receiver and he was duly appointed, but it is against the other provisions of the order that the present appeal is brought. The order appoints the appellant receiver and gives him power to give a good discharge for any property, and particularly pensions, belonging to the patient. Para. 3 of the order directs him to lodge in Court all sums received by him under that direction, and by the lodgment schedule the money so lodged in Court was to be accumulated. We may take it that for all practical purposes the only money that would come into Court under that provision would be receipts in respect of the patient's old age pension. Para. 4 of the order, stated shortly, gives to the county council a charge on the money for the time being in Court, for any sum then due and future sums becoming due to the county council in respect of the patient's maintenance. It goes on to provide that the charge " is not to be enforceable (except with the leave of the "Master) until the death of the patient and is to be the subject "of any order of the Master for the application for the benefit "of the patient of the property charged, but before any such "order is made notice is to be given to the chargees." That is all that I need say about the order.

The complaint that is made against the order by the appellant is shortly this: he says that in place of the directions for payment into Court and accumulation of the money received from time to time in respect of the patient's old age pension the order should have provided that those sums should be applied for maintenance, and he asks that paras. 3, 4 and 5 and the lodgment schedule should be deleted and the following paragraph substituted: "The net income "of the patient is allowed for his maintenance." So that what he is asking the Court to do is to direct payment of this old age pension in aid of the local rates.

Now it is necessary to state quite shortly what the nature of this pension is and what rights exist with regard to it. The pension in question is an old age pension which became payable by reason of the Widows', Orphans' and Old Age Contributory Pensions Act, 1936, when the patient reached seventy years of age. It used to be the case that old age pensions ceased to be payable when the pensioner became rate-aided, but that has now been changed in certain respects. The material respect in which it stands changed at the present day in the case of rate-aided persons of unsound mind is this, that in the case of an old age pension payable under this Act it is provided by the Third Schedule to the Act that the pension shall not cease to be payable by reason of the circumstance that the person of unsound mind is a rate-aided person. Nevertheless although the right to the pension payments remains, that right, according to s. 21, sub-s. 1 (*b*), must be exercised within three months after the date when a payment falls to be made. The result of that of course is that, unless there is some hand to receive the pension on behalf of a person of unsound mind, he can never be entitled to any payment after three months have elapsed. Nevertheless if there is one thing clear in this jurisdiction it is I think this, that the Legislature has quite clearly avoided providing for payment of old age pensions to local authorities in aid of rates, either in the case of persons who are not of unsound mind or in the case of persons who are of unsound mind. That appears from one or two considerations which are worth looking at, because they have a bearing on the present question. Sect. 32, sub-s. 2, of the Widows', Orphans' and Old Age Contributory Pensions Act, 1936, and the regulations made thereunder, provide for payment to a local authority out of a pension of sums for the purpose of providing additional comforts for a pensioner of unsound mind detained in a rate-aided institution. Subject to that the sub-section contemplates that the pension remains the property of the pensioner, and certainly does not contemplate that the local authority is necessarily going to get it in aid of the rates. Under that sub-section the regulations that were made provide that a sum not exceeding *2s. 6d.* a week should be payable in respect of additional comforts for the pensioner, and the regulations of 1937, No. 883, use rather striking language because they say that: (cl. 2, proviso) "Provided "that where the pensioner has no such dependants"—that relates to a matter which I need not pause to mention—"there shall be paid to the authority such sum only as shall "be required for the purpose of providing additional comforts "for the pensioner." (1) Another set of regulations made under para. (*f*) of sub-s. 1 of s 32 enables the Ministry of Health, in cases where there is nobody acting for that purpose, to appoint a person to act on behalf of a pensioner who is of unsound mind, and to receive the pension. We were told that it is not the practice to appoint local assistance officers under that paragraph, the Ministry taking the view—which appears to me, if I may say so, to be clear upon the face of the statute—that the statute does not contemplate that the pension is going necessarily to be received by the local authority in aid of rates. That does not mean of course that the Court in Lunacy ought to put the local assistance authority necessarily in a worse position than it would have been in respect of property belonging to a person of unsound mind. It seems to me that so far as the statute is concerned the sums received in respect of pension are the property of the person of unsound mind, and fall to be dealt with by the existing jurisdiction under the Lunacy Acts, and it is in that position that the matter has been left by the Legislature.

We therefore come to this result, that money received for old age pensions in respect of a person of unsound mind who is a rate-aided person in a mental institution falls to be dealt with under the ordinary discretionary jurisdiction of the Court. The difficulties which we are told arose are understandable, because it is possible that in cases of this kind the management and administration department would not hear of such cases and it would be difficult in any case to find anybody to act as receiver. Accordingly the very convenient practice was considered and adopted of appointing as receiver the public assistance officer concerned—if he chose to apply. The benefit of that is this: first of all, the pension does not lapse, because there is some person there with authority to receive it. Then, from the point of view of the local authority the benefit of that procedure is that the pension is obtained and is not lost, and the rights of the local authority are preserved in the same way as the rights of creditors would be preserved under the ordinary jurisdiction in mental cases. For that purpose this form of order has been adopted. We are told that it has been adopted without question in some two thousand cases, but that would not debar this Court from saying that the order was wrong if we were convinced that it was wrong. Speaking for myself, I am quite convinced, after the careful examination we have made with the assistance of learned counsel on both sides, that the order is one that not only could properly be made but was properly made.

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(1) St. R. & O. 1937, pp. 464, 465.

A number of matters were considered in the course of the argument, but many of them, although the discussion of them was extremely useful, I need not go into. It is sufficient for me to say, first of all, on the question of jurisdiction to make the order, that the local authority which provides maintenance for a rate-aided person of unsound mind has certain statutory rights to obtain some reimbursement for what it has spent out of property belonging to that person. There is s. 299 of the Lunacy Act, 1890. There is also a section of the Poor Law Act, 1930, s. 20, under which certain recoveries may be had under a period of limitation of twelve months, and I am not sure that there are not some other statutory provisions under which, if the proper machinery is used, certain recoveries may be had. That has always been considered, so far as I read the cases to which we have been referred, as justifying the Court in Lunacy giving to the local authority which maintains the person of unsound mind a right to reimbursement in some shape or form.

There being ample jurisdiction therefore to make an order of this kind by which the local authority would be able to reimburse itself, the sole question is whether this order is one which the Master, in the exercise of his discretion, ought to have made. The object and purpose of the order is quite clear. It is intended on the face of it to reconcile in cases of this kind the interests of the person of unsound mind and the just and fair claims of the local authority. Paramount of course is the interest of the person of unsound mind. The rights of creditors in the case of a person of unsound mind are always dependent upon the interests of that person, and they may receive payment if, and only if, it is not detrimental to the person of unsound mind that they should have payment. In the present case we can treat, for practical purposes so far as this appeal is concerned, the local authority as standing in a position equivalent to that of a creditor of the patient. In saying that I am not to be taken to be expressing any opinion on the subject that has been discussed before us as to whether or not the true position is that of a creditor at common law or by statute, or matters of that kind. For practical purposes they are being treated here as standing in the position of creditors. The effect and object of the order is, while preserving to them that right, to ensure that this pension, which is the only property of the patient, is not going straight into the pockets of the local authority as soon as it is received. Had it done so, the result would have been that, if the patient were to recover, he would go out of the institution without one penny in the world. That is not a situation which any prudent and reasonable administration of the jurisdiction in cases of persons of unsound mind can contemplate for one moment, and accordingly the order is framed so as to enable the Court to keep its hand on an accumulation of pension moneys with a view to ensuring that the patient, if and when he recovers, will leave the institution in a position to begin life again. If on the other hand he does not come out of the institution but dies leaving that fund, under the order the right of the local authority is preserved and it can apply to be paid out of the fund in Court.

It seems to me that the order effects in a very wise and proper manner a just compromise between the rights of the local authority and the interests of the patient. The interests of the patient are protected and so are those of the local authority. The misapprehension which I think must have given rise to the present appeal in the minds of the local authority concerned is that for some reason, or in some way because they maintain this man out of the rates, they ought to be entitled to receive his old age pension. That is in my judgment an entire misconception.

We were referred to orders which were made in cases where, in addition to being entitled to a pension, the person of unsound mind in a rate-aided institution had got some little property of his own, I think a matter of some 97*l.* in the case quoted to us. In that case the form of order was one under which it was intended apparently that the whole income of the patient should be applied for maintenance, and it appears to have been intended, under that order, that the receiver should apply for maintenance, not merely the income of the small amount of capital which the patient owned, but also the payments received in respect of his old age pension, and it was suggested that there was no reason why the order in those cases should not be used in the present case, so that the pension could be applied for maintenance. But, as it appears to me, there is all the difference in the world between the two cases. In the case to which we were referred the patient had got a small sum of capital which was being preserved for him. If he recovered, he would have had that 97*l.* to take away and start himself in life again. Therefore in the exercise of his discretion the Master took the view that it was not inconsistent with the true interests of the patient that the pension, and whatever income the 97*l.* brought in, should be used for his maintenance. It would still leave the patient with his capital intact. But in the present case, where the patient has nothing in the world except his pension, if and when he is discharged, if there is no accumulation, he will be placed in the position of leaving the institution without a penny. Therefore the object of the order was to build up for

LORDS JUSTICES SITTING IN LUNACY.

1938

T. R. M., *In re.*

Sir Wilfrid Greene M.R.

him something which he had not got for himself—namely, a small capital which will be available on his leaving, if ever he does leave. As soon as that sum is built up he will stand in the same position as the person who begins with a little capital of his own. It seems to me that the order in the present case was one which the Master had ample jurisdiction to make, and moreover is one which is not merely a perfectly proper and good order but an extremely wise and just order, and I can see no reason for interfering with it.

I should like to say in conclusion that the matters discussed in this case have ranged over a number of topics, because it was of great importance to the Court to be put in possession of all the legal considerations affecting the matters underlying the claims of the local authority; we have received full assistance in that matter from counsel, and the fact that I have not thought it necessary to deal with many of the matters discussed does not mean that that discussion was not of great assistance because in the result it became unnecessary to go into them in this judgment.

There is one matter to which I should refer, because it did arise in the course of the discussion. When the terms of the order are looked at, I think that they do not purport to impose upon the pension itself any charge. The charge is upon the funds in Court if and when they get there. Accordingly it is not necessary to go into the question whether or not it would be competent to impose a charge upon a pension under this Act, having regard to the statutory provisions which deal with it. Therefore I must not be taken to be expressing any opinion one way or the other upon that subject.

The appeal therefore must be dismissed.

SCOTT L.J. I agree.

CLAUSON L.J. I agree.

Appeal dismissed.

Solicitors: *Taylor, Jelf & Co., for E. W. Scorer, Clerk to the County Council of Lincoln (Parts of Lindsey); Official Solicitor.*

A. R. LL.-T.

SHENTON *v.* TYLER.

SIMONDS J.

1938

Nov. 22.

[1938. S. 1375.]

Practice—Evidence—Interrogatories—Alleged secret trust—Communication by husband to wife—Death of husband—Widow's absolute privilege from discovery—Evidence Amendment Act, 1853 (16 & 17 *Vict. c.* 83), *s.* 3.

The common law rule of evidence that all communications between a husband and wife made during the marriage are privileged from disclosure extends equally to a widow after the death of her husband; neither party is compellable by interrogatory or otherwise to give evidence on any matters which have been so communicated between them. The rule has not been modified in any way by s. 3 of the Evidence Amendment Act, 1853.

PROCEDURE SUMMONS.

The summons was taken out by the plaintiff, Mrs. Florence Annie Shenton, asking leave to put certain interrogatories to the defendant, Mrs. Edith Lilian Tyler.

The defendant's husband, Edmund Deeble Tyler, who died on January 6, 1937, by his will dated October 4, 1932, appointed the defendant, Henry Peters Tyler and Frank Dixon to be his executors and devised and bequeathed all his residuary estate to the defendant absolutely.

The plaintiff brought this action against the defendant, claiming a declaration that the testator, E. D. Tyler, in his lifetime created a secret trust in her favour by communicating to his wife, the defendant, his wish that she should pay the weekly sum of 2*l.* to the plaintiff during the plaintiff's lifetime; that the defendant promised so to do; that acting on the faith of such promise the testator left the whole of his residuary estate to the defendant amounting, in the belief of the plaintiff, to 70,000*l.*; and that the defendant had thereby become bound to pay the weekly sum of 2*l.* to the plaintiff during her lifetime.

The defendant made weekly payments of 2*l.* to the plaintiff after her husband's death until March 8, 1937, and then discontinued them. By her defence she denied that any such request by her husband or promise by herself had been made, or that any secret trust as alleged had ever been created. Any money which she had paid to the plaintiff was paid voluntarily and by way of alms-giving, and not under any obligation.

The plaintiff now sought to interrogate the defendant as to the alleged request and promise. The form of the proposed interrogatories is set out in the judgment.

The defendant objected to answer any interrogatories on the ground that they related to matters which, she claimed, had passed between herself and her husband and were therefore absolutely privileged from disclosure.

Roger Turnbull for the plaintiff. The old common law rule was that a husband or wife could not give evidence either for or against one another, and therefore that any communication made by a husband to a wife, or a wife to a husband during the marriage was privileged from disclosure: Taylor on Evidence, 11th ed., at pp. 617, 618. *Doker* v. *Hasler.* (1)

But the law on the question is now contained entirely in s. 3 of the Evidence Amendment Act, 1853, and a widow, though she may have been protected under the common law rule is not mentioned in the section. The widow of a dead husband cannot be described as his wife.

Here the widow is, I submit, compellable to disclose communications made to her by her former husband. The plaintiff alleges that there is a secret trust, and, if the widow, by refusing to answer these interrogatories, refuses to give effect to the trust, she will thereby be committing a fraud.

The section cannot cover a communication made by a woman to her former husband, or by him to her, because she is no longer his wife.

G. D. Johnston for the defendant. There is an absolute rule of law that no husband or wife is compellable to disclose any fact imparted by the one to the other during the marriage, and it makes no difference if she has become his widow. The Evidence Amendment Act, 1853, was passed to create certain exceptions in the old rules of evidence, but in this respect has not altered the law. Sect. 3 must be read in conjunction with ss. 1 and 2. The common law rule is stated by Lord Alvanley in *Monroe* v. *Twisleton* (1) and by the Court in *Doker* v. *Hasler* (2) and *O'Connor* v. *Marjoribanks* (3), and these cases show that a widow is entitled to the same privilege as a wife. See also the Evidence Act, 1851 (14 & 15 Vict. c. 99.)

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(1) (1824) Ry. & Moo. 198.

Roger Turnbull in reply. The Evidence Amendment Act, 1853 (4), was intended as a comprehensive codification of the law of evidence affecting husband and wife.

SIMONDS J. In this case there arises under a procedure summons a somewhat curious point. The plaintiff claims that during his life a certain testator, now dead, communicated to his wife, the defendant in these proceedings, his wish that she should pay to the plaintiff during the plaintiff's life out of the estate of the testator a certain weekly sum. She claims that the defendant promised the testator to pay that weekly sum, and that on the faith of that promise the testator allowed the defendant to become entitled under his will to his residuary estate. The plaintiff pleads that she is unable to give particulars of that promise until discovery.

The defendant, by her defence, wholly denies that any such wish was expressed or promise made. On that issue is joined, and then the plaintiff seeks to establish her case by interrogating the defendant, and the interrogatories which she seeks to administer are these: "(1.) Did not your late "husband communicate to you during his lifetime his wish "that you should during the lifetime of the plaintiff pay to "her or to some other and what person for her own use the "weekly sum of 2*l.* or some other and what weekly sum?

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(1) (1802) Peake's Add. Cas. 219.

(2) Ry. & Moo. 198.

(3) (1842) 4 Man. & Gr. 435, 442.

(4) Evidence Amendment Act, 1853 (16 & 17 Vict. c. 83).

[Sect. 1 enables the husbands and wives of parties to suits, actions or other proceedings to be competent and compellable to give evidence.]

Sect. 2: "Nothing herein shall "render any husband competent "or compellable to give evidence "for or against his wife, or any "wife competent or compellable "to give evidence for or against "her husband, in any criminal "proceeding."

Sect. 3: "No husband shall be "compellable to disclose any communication made to him by his "wife during the marriage, and "no wife shall be compellable to "disclose any communication "made to her by her husband "during the marriage."

"(2.) If yea, what was the date of such communication? "(3.) Did you not promise your late husband that you would "during the lifetime of the plaintiff pay to her or to some "other and what person for her use the weekly sum of *2l.* "or some other and what weekly sum? (4.) If yea, what was "the date of such promise?" Those interrogatories are objected to by the defendant on the ground—and it is the only ground which has been contested before me—that she stood in the relation of wife to the testator and any communication made to him by her, or by him to her, is protected by the old common law of the inviolability of any confidence which has passed between husband and wife. That rule is no doubt a rule of the common law which goes back for many centuries.

I have been referred to a number of cases, the first of which was *Monroe* v. *Twisleton* (1), a decision of Lord Alvanley in 1802. The side-note is this: "Where man and wife are "divorced by Act of Parliament, the wife is not competent "to prove a contract made by her husband previous to the "divorce." The only question there was in what respect her evidence was limited or qualified by that. She had been, though she no longer was, his wife. What Lord Alvanley said was (2): "To prove any fact arising after the divorce this "lady is a competent witness, but not to prove a contract "or anything else which happened during the coverture. "She was at that time bound to secrecy; what she did "might be in consequence of the trust and confidence reposed "in her by her husband; and miserable indeed would the "condition of a husband be, if, when a woman is divorced "from him, perhaps for her own misconduct, all the occur-"rences of his life, entrusted to her while the most perfect "and unbounded confidence existed between them, should be "divulged in a court of justice."

That principle of the common law was approved by Best C.J. in *Doker* v. *Hasler* (3), and again in *O'Connor* v. *Marjoribanks* (4), where, after a consideration of earlier cases, Tindal C.J. said (5):

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(1) Peake's Add. Cas. 219.
(2) Ibid. 220.
(3) Ry. & Moo. 198.
(4) 4 Man. & Gr. 435.
(5) Ibid. 442.

"It appears to me that . . . . *Monroe* v. *Twisleton* (1) is "the sounder; and that the doctrine therein laid down is "built upon the general rule of law, which, subject to certain "well-known exceptions, is this; that a wife never can be "admitted as a witness either for or against her husband; she "cannot be a witness for him, because her interest is precisely "identical with his; nor against him, upon grounds of "public policy, because the admission of such evidence would "lead to dissension and unhappiness, and possibly to perjury. "There are cases to show that this intimate relation subsisting "between the parties is not to be considered as dissolved by "death, so as to let in the evidence of either party as to "transactions occurring during their joint lives; but we "are asked to confine the rule to cases where the communica-"tions between the husband and wife are of a confidential "nature. But such a limitation of the rule would very often "be extremely difficult of application; and would introduce "a separate issue in each cause as to whether or not the "communications between husband and wife were to be "considered of a confidential character. Upon the whole, I "think it better to adopt Lord Alvanley's rule in *Monroe* v. "*Twisleton.* (1)" Coltman and Maule JJ. concurred in that opinion, so that the rule at common law appears to be absolute that no communication between husband and wife passing between them during the marriage state is to be divulged. Neither party is compellable by interrogatory or otherwise to give evidence on matters which have been so communicated between them.

That being the common law, it has been pressed on me by Mr. Turnbull, on behalf of the plaintiff, that the general rule of the common law is to be regarded as in some way qualified or limited by the provisions of the Evidence Amendment Act, 1853, s. 3 of which provides: "No husband "shall be compellable to disclose any communication made "to him by his wife during the marriage, and no wife shall "be compellable to disclose any communication made to her "by her husband during the marriage." The argument is that

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(1) Peake's Add. Cas. 219.

that is a complete code of the law with regard to the matters passing between a husband or a wife which one or the other of them may be compelled to disclose. The comment I must make on that argument is that the section must be read in conjunction with the two earlier sections of the Act. It appears to me, so read, to amount to no more than that the Act has provided by ss. 1 and 2 that the husband or wife of a party is an admissible and compellable witness except as provided by s. 2 in criminal cases, yet, though they are admissible and compellable witnesses, that on which they may give evidence is to be limited by the general rule of law as stated in s. 3. That section does not deal at all with the case of a widow—a widow always was an admissible witness as was a woman who was divorced an admissible witness—but, whether a widow or a divorced woman, she was not a compellable witness as to matters which passed between her and her husband.

I am dealing with the case of a widow and I find nothing in this section of the Act which in any way limits the rule of the common law that a widow was not compellable or admissible as a witness in respect to things which passed between her and her husband during the marriage state. It has again been pressed on me that the result in this particular case may be that the widow may, by pleading this rule of privilege, in fact be enabled for her own benefit to conceal a trust imposed on her by her husband. That may be, but it is not possible, in my judgment, to make a breach in the general rule of the common law because in a particular case it may mean an injustice.

Accordingly, I must uphold the objection which has been made to these interrogatories and refuse the plaintiff's application. As I think that this goes to the very heart of the matter I must make the costs the defendant's costs in any event.

Solicitors: *John B. Borer for Loseby, Son and Hammond, Leicester; Robinson and Bradley, for Evan Barlow, Son and Fordham, Leicester.*

H. L. L.

In re COLLER'S DEED TRUSTS.

C. A.
1937
June 4, 14.

COLLER *v.* COLLER.

[1936. C. 1032.]

Annuities—Weekly sums—Deed of family arrangement—Construction—Trust of balance of income during continuance of one annuity—Annuities not a continuing charge on income—Principles of construction applicable—Whether trustees should distribute surplus income without regard to possible deficiency in a future year.

By a deed of family arrangement the residuary estate of a testator was to be held upon trust to pay three life annuities in the form of weekly sums, of which one was payable to B. C. during her widowhood. The deed also contained a trust during the widowhood of B. C. to pay or apply the whole or any part of the balance of the income on certain trusts and an ultimate trust as to capital and income for the testator's four sons:—

Held (affirming the decision of Farwell J.), that the weekly sums were neither a charge upon corpus nor a continuing charge upon the income of the residuary estate.

Stelfox v. *Sugden* (1859) Johnson, 234 followed.

APPEAL from Farwell J.

By a deed of family arrangement dated September 26, 1932, provision was made for varying the trusts declared by the will of Harris Coller, who died on February 22, 1932. The deed contained the following clause:—

"Subject as aforesaid the trustees shall hold the said "testator's estate and the income thereof upon the following "trusts:

"(*a*) Upon trust to pay out of the income thereof the "sum of ten pounds per week to the testator's widow Baila "Coller during her widowhood:

"(*b*) Upon trust to pay out of the income thereof the sum "of three pounds per week to the said testator's widowed "daughter Fanny Bloom during her widowhood:

"(*c*) Upon trust to pay out of the income thereof the

Reported by Sir Lancelot Elphinstone, Barrister-at-Law, from a short note by the late W. Ivimey Cook, and with the assistance of counsel for the appellants and respondents.

"sum of one pound per week to the said testator's mother "Rachel Coller during her life:

"(*d*) Upon trust during the widowhood of the said Baila "Coller to pay or apply the whole or any part of the balance "of the income thereof for the maintenance support or "otherwise for the benefit of all or any one or more exclusively "of the other or others of the said Baila Coller, Benjamin "Coller, Jack Coller, Maurice Coller, and David Coller as "the trustees in their absolute discretion think fit and subject "as aforesaid to apply the said balance of the said income "in payment off of the existing mortgages on the said "testator's estate or some part thereof:

"(*e*) Upon trust as to capital and income for the said "Benjamin Coller, Jack Coller, Maurice Coller, and David "Coller in equal shares."

The weekly sums were paid in full down to August 12, 1935, but since then had fallen into arrear.

An originating summons was taken out by Baila Coller asking that it might be declared that on the true construction of the deed the three weekly sums were a charge on the capital of the money and investments from time to time subject to the deed (called the trust fund), or alternatively were a continuing charge on the income of the trust fund, and for consequential relief.

By an order dated July 10, 1936, Farwell J. declared that on the true construction of the deed the three weekly sums were neither a charge on the capital of the trust fund nor a continuing charge on the income of the trust fund and were payable only out of the income of the trust fund of the current year.

The plaintiff Baila Coller appealed. The appeal was heard on June 4, 1937. The appellant did not challenge Farwell J.'s decision that the annuities were not charged on corpus.

Cleveland-Stevens K.C. and *G. A. Rink* for the appellant. The annuities are a continuing charge on income. There is nothing to limit the annuitants to the income of a single year, or to prevent them from having recourse to the income of future years, although the surplus income of any year cannot be retained to meet possible future deficiencies. The mere fact that the surplus income of each year is here expressly disposed of does not materially alter the ordinary position, under which surplus income is (without any express direction) properly payable to the persons entitled to the residue of the fund subject to the annuity: *In re Platt. Sykes* v. *Dawson.* (1) It is true that in *In re Platt* (1) the residue was given " subject to " the annuity, but these words must be implied at the beginning of sub-clause (*e*). The annuitants are entitled to have capital used to meet arrears of the annuity.

[SIR WILFRID GREENE M.R. It is clear at the present day that an annuitant who has a continuing charge on income is entitled to resort to capital.]

Stelfox v. *Sugden* (2) is distinguishable. There the prayer claimed that the residuary legatees should refund past income in order to make good the annuity. We do not make any such suggestion here.

Here the annuities are payable weekly. If the annuitants had no continuing charge on income, then whenever the trustees received any dividends, they would be entitled to pay the annuities for one week only, and would then have to deal with the remainder of the moneys in their hands in accordance with the directions as to surplus income. Consequently nothing would remain for making the weekly payments until the next dividends came in, perhaps six months later. And when those dividends came in, the annuitants would again be entitled to receive the payments for one week only, as they would not be entitled to require the dividends to be used in order to make good arrears.

[They also referred to *Wroughton* v. *Colquhoun* (3); *Ex parte Wilkinson. In re London, Brighton & South Coast Ry. Co.* (4); *Phillips* v. *Gutteridge* (5); and *Foster* v. *Smith.* (6)]

J. M. Gover K.C. and *H. O. Danckwerts* for the respondents, the four sons. This is a pure question of construction. The trust to pay the balance of income shows conclusively that the annuity is not a continuing charge on income. *Stelfox* v. *Sugden* (1) should be followed.

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(1) [1916] 2 Ch. 563.
(2) Johnson, 234.
(3) (1847) 1 De G. & Sm. 357.
(4) (1849) 3 De G. & Sm. 633.
(5) (1863) 3 De G. J. & S. 332.
(6) (1845) 1 Ph. 629.

Cleveland-Stevens K.C. replied.

R. I. Henty for the trustees.

Cur. adv. vult.

1937. June 14. SIR WILFRID GREENE M.R. said that, as he agreed with the judgment which Romer L.J. was about to deliver, there was no need for him to deliver a separate judgment.

ROMER L.J. [after stating the facts :] The question in what circumstances an annuitant is entitled to have arrears of the annuity satisfied out of the capital or future income of property is one that has frequently engaged the attention of the Court. The reported cases upon the subject are numerous and not altogether reconcilable. The question is always one of the proper construction of the instrument creating the annuity, and must accordingly depend in every case upon the precise language employed. No one case, therefore, can be said to govern another. There are, however, certain principles of construction applicable to such cases that seem to be well established. Where, for instance, there is in a will a bequest of an annuity, the residuary legatees or the other persons becoming entitled to the testator's residuary estate can only take that estate on the terms of paying or providing for the payment of the annuity in full. The annuity is a charge upon the whole income and corpus of the residuary estate just as much as if it were an ordinary pecuniary legacy. But sometimes, and this must usually be the case where the annuity is created by a settlement of personalty, the annuity arises under a trust to pay it. If the trust be one to pay the annuity out of the capital of a trust fund, no difficulty can arise. But where the trust is one to pay the annuity out of the income of a trust fund it is very often a question of considerable doubt whether the arrears of the annuity in one year can be paid out of the income of a subsequent year. The language of the instrument may, indeed, make it quite clear that the instalment of the annuity for one year is only to be paid out of the income for that year. But even when the actual trust for the payment of the annuity, if standing by itself, would be so construed, the subsequent language may show that the arrears in any year are to be raised out of the corpus of the trust fund. Such will be the case if the corpus be given not merely " subject to the trust for payment of the annuity " but "subject to the payment of the annuity." For these, or words to the same effect, indicate that the corpus is only to be taken on the terms that the annuity is paid in full, and the trust to pay the annuity out of the income for each year is regarded as being directory only and not as limiting the rights of the annuitant. But now take the case of a trust to pay an annuity out of the income of a trust fund without any subsequent indication being given that the annuity is in any case to be paid in full, and without any express words confining the annuity for any one year to the income of that year. Under such a trust the annuity is prima facie a continuing charge upon the income of the fund, and the annuitant, or his legal personal representatives after his death, will be entitled to have the income impounded until all arrears of the annuity are paid. Sometimes, indeed, this right only extends to the income arising during a limited period such as, for instance, the annuitant's life. This is the case when a trust is expressed to take effect at the expiration of that period in terms that show that the whole trust fund both capital and future income is, at that moment, to go over to another person intact. But in the absence of any such indication the right to have the income applied in satisfaction of the arrears will continue until the arrears are satisfied. But what is to happen to the surplus remaining in any year after the annuity and all arrears up to that time have been satisfied ? I cannot think that the answer to this question admits of any doubt. Where any property is charged with or is subject to a trust for payment of an annuity the annuitant is entitled to demand and can, by taking the appropriate steps, ensure that every part of that

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(1) Johnson, 234.

C. A.

1937

COLLER'S DEED TRUSTS, *In re.* COLLER *v.* COLLER.

Romer L.J.

property is made available for payment of the annuity, and the right of the annuitant must prevail whatever may be the nature of the property that is charged or is the subject-matter of the trust. Where, therefore, the property in question is the income of a fund, the annuitant is in strictness entitled to require that the surplus income in any year, after keeping down the current instalments of the annuity and any existing arrears, shall, within the limits permissible by law, be accumulated for the purpose of meeting subsequent instalments. If this be the right, as I think it is, of an annuitant whose annuity is a continuing charge upon the income of a fund until paid in full, any directions in the instrument creating the annuity that are inconsistent with that right indicate that the annuity is not meant to be so charged. This will be the case whenever the instrument provides that any surplus income in any year after the current instalment of the annuity is to be paid to or applied for the benefit of other persons. Such a provision was contained in the will that fell to be considered by Lord Hatherley when Vice-Chancellor in *Stelfox* v. *Sugden*. (1) In that case a testator directed the trustees of his will out of the income of his residuary estate to pay to his widow during her life an annuity of 100*l.*, and declared that his trustees should during her life divide and pay the residue of the income for the benefit of various beneficiaries who did not include the widow, and that from and after the decease of his widow his trustees should stand possessed of the residue of the trust moneys on trusts in favour of a class that was not the same as the class entitled to the surplus income. The widow's annuity having fallen into arrear, it was contended on her behalf that the annuity was charged upon corpus. This contention was, however, rejected by Lord Hatherley, because, and solely because, of the trust contained in the will of the surplus income during the widow's lifetime. If the annuity were charged on corpus, or were a continuing charge upon income, the result would have been that after her death the persons then entitled to the trust fund would have been obliged to make good thereout all arrears of her annuity, without any recourse against those persons who, during her lifetime, might have received surplus income. This result was regarded by Lord Hatherley as an absurdity which the testator could not have contemplated.

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(1) Johnson, 234.

Turning now to the deed with which we are concerned on this appeal, it is plain that the weekly sums are not charged upon corpus. Farwell J. so held, and the appellant does not challenge that decision. But the learned judge also held that the weekly sums were not a continuing charge upon income. In so holding he based his decision upon the direction in the deed as to the surplus income arising during the widowhood of the appellant, following the reasoning of Lord Hatherley in *Stelfox* v. *Sugden.* (1) In my opinion he was right in so doing. I think that the direction in question shows unmistakably that the parties to the deed intended that the weekly sums in any year should be paid out of the income of that year and out of that alone. Suppose, for instance, that during the first few years of the appellant's widowhood there was a surplus of income after paying the three weekly sums, and that the trustees in the exercise of their discretion had applied the whole of such surplus for the widow's benefit. Suppose further that during the remainder of her widowhood the income was insufficient to pay the weekly sums. It can hardly have been within the contemplation of the parties that the widow, or her legal personal representatives, should in such circumstances be paid the arrears of her weekly sum out of the income accruing after her remarriage or death. In my opinion the express trust contained in the deed for distribution of the surplus income is a reasonably plain indication that the weekly sums were not intended to be a continuing charge upon the income of the trust fund.

It only remains to say a few words about the case of *In re Platt* (2), on which the appellant's counsel placed some reliance. For this purpose it is necessary to refer once more to the strict rights, as I conceive them to be, of an annuitant whose annuity is charge upon the corpus or the income of a fund. An annuity so charged affects the whole subject-matter of the

(1) Johnson, 234. (2) [1916] 2 Ch. 563.

charge, and the persons entitled subject to the charge can only claim that subject-matter on the terms of providing for the annuity in full. But in practice, and as a matter of administration, the distribution of the corpus or the income subjected to the annuity is never held up altogether in cases where the annuitant cannot be prejudiced by a partial distribution. See, for example, *Harbin* v. *Masterman.* (1) Where, therefore, an annuity is charged upon income that in all human probability will always be sufficient to pay it, the trustees will be justified in paying the surplus income in each year to the persons entitled to the income upon which the annuity is charged.

Now the facts in *In re Platt* (2) were as follows: A testator, who died in 1906, had by his will bequeathed a share of his residuary estate upon trust out of the income thereof to pay his widow an annuity and, subject thereto, to permit the share and the income thereof to devolve as therein mentioned. The testator's residuary estate consisted partly of ordinary shares in a limited company. The dividend on these shares had been reduced from 7½ to 5 per cent. since the war, but so long as the company continued to pay a dividend at that rate the income of the share of the residuary estate was sufficient to pay the annuity and leave a surplus over. If, however, the dividend were passed, or were further materially reduced, there would be a deficiency. In these circumstances the trustees of the will applied to the Court to have it determined whether surplus income in their hands ought to be resorted to for the purpose of making good the annuity in any year in which the income was not sufficient to pay it. At the date when the summons was taken out it was thought that the dividend on the shares would be less than 5 per cent., but before the summons came on for hearing the dividend had in fact been declared at that rate. Sargant J., while feeling great doubt on the point, held that the income of the share in the residuary estate, after satisfying the claims of the annuitant down to date, ought to be distributed among the persons who, subject to the annuity, were entitled to such income. But

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(1) [1896] 1 Ch. 351.

(2) [1916] 2 Ch. 563.

C. A.
1937
Coller's Deed Trusts, *In re.*
Coller *v.* Coller.
Romer L.J.

he then added this (1): "Of course, if the trustees should foresee "a certain deficiency and should have surplus income in their "hands, I do not intend to preclude them from applying this "money to make good the annuity. As a matter of administration and of immediate adjustment they might make good the "annuity out of any income in their hands. All that I decide "is that they are not to retain or accumulate any surplus "income for the purpose of making good a possible or contingent deficiency in a future year." This view of the rights of an annuitant whose annuity is charged upon the income of a fund does not seem to differ substantially from the view of those rights which I have endeavoured to express.

In my opinion the decision of Farwell J. was right and the appeal should be dismissed.

Scott L.J. I have had the privilege of reading and considering the judgment which has just been delivered, and I entirely agree with it.

Appeal dismissed.

Solicitors for appellant: *R. Shapiro & Co.*
Solicitor for the respondents, the four sons: *N. Mackover.*
Solicitors for the trustees: *Teff & Teff.*

L. H. E.

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(1) [1916] 2 Ch. 563, 569.

C. A.

1938

Oct. 13, 14, 17; Nov. 25.

In re CLEADON TRUST, LIMITED.

[00213 of 1937.]

Company—Advances by director to subsidiary companies for benefit of company—Advances made at request of secretary—Borrowing not authorized by effective resolution of directors.

One of the two directors of a company paid money at the request of the secretary in discharge of debts owed by two subsidiary companies and guaranteed by the company, in expectation that the company which benefited thereby would repay him. The secretary and the directors were also the secretary and directors of the subsidiary companies. At a meeting of the directors a resolution was passed purporting to confirm some of the advances, and they were treated in the books of the company as advances to the company. The quorum for such meetings was two, but by the company's articles of association no director could vote in respect of any contract or agreement in which he was interested. The company and the subsidiary companies subsequently went into voluntary liquidation. The assets of the subsidiary companies were insufficient to discharge the amounts owing on their debentures:—

Held, (1.) that the resolution had not been validly passed by an independent board and that on the facts there was neither knowledge nor acquiescence on the part of the company rendering it liable at common law under an implied contract to repay the director; (2.) (per Scott and Clauson L.JJ., Sir Wilfrid Greene M.R. dissenting) that there was no equitable principle which imposed any liability on the company, inasmuch as it had never had anything to do with the transactions, and that accordingly the director was not entitled to recover the sums advanced by him.

Bannatyne v. *D. & C. MacIver* [1906] 1 K. B. 103 distinguished.

Decision of Bennett J. [1938] Ch. 660 affirmed.

APPEAL from a decision of Bennett J. (1)

Cleadon Trust, Ld. (hereinafter called "the company") was incorporated on April 29, 1925, under the Companies Act, 1908–1917, as a public company limited by shares with a nominal capital of 60,000*l.* divided into 60,000 shares of 1*l.* each. The issued capital was 51,847 shares, all fully paid. Robert Creichton (hereinafter called "the appellant")

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(1) [1938] Ch. 660.

Reported by F. H. Cowper, Esq., Barrister-at-Law.

was registered as holder of 27,417 shares; one Kelly held 4477 shares, and the balance of 19,953 shares was distributed amongst sixty-one other holders. There were at one time two directors, the appellant and one William Jackson, who was managing director (appointed under a power given to the directors by the articles of association) and who ceased to be a director on August 6, 1931. On that day Kelly was appointed a director, and from then until the liquidation he and the appellant were the only directors of the company, there being no managing director. The secretary of the company was one Antrobus (hereinafter called "the secretary"). The business of the company was that of an investment trust and guarantee company, and consisted for the most part of lending money for the construction of houses, flats and other buildings.

The articles of association contained the following provisions:—

Art. 99: "Until otherwise determined by a general meeting "the number of directors shall not be less than two nor more "than six."

Art. 110: "The business of the company shall be managed "by the directors who may . . . . exercise all such powers "of the company . . . . and do on behalf of the company all "such acts as may be exercised and done by the company "and as are not by the statutes or by these articles "required to be exercised or done by the company in General "Meeting."

Art. 116: "A director may contract with and be interested "in any contract or arrangement made with the company "either as vendor, purchaser or otherwise and shall not be "liable to account for any profit made by him by reason of any "such contract or arrangement, provided that the nature of "the interest of the director in such contract or arrangement "be declared to the Board before the same is entered into or "in any case at the first meeting of the directors after the "acquisition of his interest, but no director shall vote as a "director in respect of any contract or arrangement in which "he shall be interested, and if he do so vote his vote shall not "be counted; but this provision shall not apply to any arrangement for giving a director security for advances or by way of "indemnity or to any allotment of shares or debentures of "the company . . . ."

Art. 124: "The directors or any committee of directors "may meet together for the despatch of business, adjourn "and otherwise regulate their meetings as they think fit, and "determine the quorum necessary for the transaction of "business. Until otherwise determined, two shall be a "quorum."

The company owned shares in two subsidiary companies, namely, Carlisle (Builders), Ld. (hereinafter called "Carlisles"), incorporated on April 17, 1926, and the Property and Building Corporation (hereinafter called "P. B. C."), incorporated on October 24, 1930, and held debentures covering all their assets. At the relevant dates the directors of Carlisles and P. B. C. were the same persons as the directors of the company, and the secretary of the company was the secretary of both these companies. The three companies all had the same office.

For some time before the events material hereto the appellant had been in the habit of advancing large sums to the company at the request of Jackson, the managing director. On October 27, 1929, at his request, a sum was paid by the appellant to Carlisles on the footing that the company should be liable to repay the amount to him. All sums so provided were entered in a ledger account in the company's books in the appellant's name. After Jackson left the Board the appellant continued to make advances to the company.

In 1930 and 1931, a block of flats called Tufton Court was being constructed by a company named Hammond and Barr, Ld. (hereinafter called "the builders"). Carlisles had entered into a contract with one Warwick Brookes, then the building lessee, to provide him with the moneys to pay the builders their instalments under the building contract. The performance of this contract by Carlisles was guaranteed by the company by a document dated October 3, 1930 (hereinafter called "the first guarantee"), addressed to Warwick Brookes. The interest of Warwick Brookes was subsequently taken over by P. B. C., who became liable to pay the builders, and this liability was guaranteed by the company by a document dated April 9, 1931 (hereinafter called "the second guarantee") addressed to the builders. P. B. C. took a lease of the flats when they were completed.

During the construction of the flats sums of money became due to the builders from Carlisles in the currency of the first guarantee and from P. B. C. in the currency of the second. Neither the subsidiary companies nor the company had the necessary funds and the appellant from time to time provided money for the purpose by cheque drawn on his bankers.

On January 2, 1931, during the currency of the first guarantee, he provided 2000*l.* at the request of Jackson, the managing director, by cheque drawn in favour of the company. It was endorsed by a person purporting to act on behalf of the company and paid into the banking account of Carlisles. The amount was used towards paying the builders a sum of 2125*l.* then due to them.

On seven occasions in the last six months of 1931 during the currency of the second guarantee he provided sums amounting in all to 13,875*l.* by cheques drawn in favour of the builders and sent to them through P. B. C. The first of these sums was 2500*l.* provided on July 29, 1931, at Jackson's request. The remaining sums were provided at the secretary's request, with the approval of Kelly after he became a director.

The appellant made the payments upon the footing that they should be treated as loans made by him to the company. This was the arrangement between the appellant and Jackson in the case of the first two payments and between the appellant and the secretary, Kelly also assenting, in the case of the other six. They were so treated, all payments being placed to his credit in his loan account in the company's ledger. Corresponding entries to the debit of Carlisles and P. B. C. respectively were at the same time made in the accounts of those companies in the company's ledger. Interest on the sums in question was from time to time paid to the appellant by the company or credited to him in account.

In July, August and November, 1932, at the secretary's request, the appellant paid into the banking account of Carlisles three sums amounting to 1200*l.*, entries with regard to them appearing in his ledger account. The company's balance sheet for the year ending March 31, 1932, contained a statement that the company had given an unlimited guarantee of the overdraft of Carlisles, and this guarantee was subsisting in July, August and November, 1932.

The appellant also provided a sum of 62*l.* 3*s.* 7*d.* for paying a debt due from P. B. C. to the electricity company supplying Tufton Court and a sum of 216*l.* 4*s.* 4*d.* for paying a debt from Carlisles to a firm of solicitors. In these cases there was no liability on the company.

The secretary had no authority to borrow on behalf of the company, and all the transactions took place without the sanction of a resolution of the board of the company. At a board meeting of the company held on December 5, 1932, at which the directors present were the appellant and Kelly, the following resolution was passed: "It was resolved that "the several advances to the Property and Building Corporation, Ld., made by R. Creighton between the 29th July, "1931, and the 12th December, 1931, amounting to 13,875*l.*, "which were made at the request of the Cleadon Trust, Ld., "be confirmed."

In the annual balance sheets submitted to the company in general meeting and adopted by the company, the sums paid by the appellant for Carlisles and P. B. C. were included in the item of sundry creditors on the debit side of the accounts. There was nothing in the accounts to indicate to the shareholders that the appellant was a creditor; the shareholders were never told the facts relating to the advances made by him nor were they ever asked to pass any resolution recognizing the fact that he was a creditor in respect of the sums in question. It was admitted that the company benefited by the payments which he made.

The liquidation of the company, which was a members' voluntary liquidation, began on February 6, 1935. The subsidiary companies also went into liquidation, their assets being insufficient to discharge the amounts owing on their

C. A.
1938
CLEADON TRUST, LD., *In re.*

debentures. The appellant made his proof in the company's liquidation for the sum of 53,361*l.* 14*s.* 11*d.* for money lent and interest thereon at the rate of 2 per cent. per annum. Notice of rejection of the proof to the extent of 18,254*l.* 7*s.* 3*d.* was given on June 8, 1937. In the notice the liquidator stated the grounds of rejection in the following terms: "I reject your proof to the extent of 18,254*l.* 7*s.* 3*d.* This "sum is made up as follows: (*a*) 17,353*l.* 7*s.* 11*d.* of the sum "claimed by you represents sums advanced from time to "time by you or paid by you on behalf of Carlisle (Builders), "Limited, and Property and Building Corporation, Limited, "and which were in your account with the company, without "any authority, treated as advanced to the company; in "order apparently to place the matter partly in order, a "resolution was passed at a directors' meeting held on the "5th December, 1932, under which the board resolved that "advances made by you to the said Property and Building "Corporation, Limited, between July and December, 1931, "amounting to 13,875*l.*, should be assumed by the company. "The only directors present were you and Mr. Kelly. The "quorum for directors' meetings is two. Under article 116 "of the company's articles of association you were precluded "from voting upon the said resolution of the board, which was "therefore invalid and not binding. (*b*) 900*l.* 19*s.* 4*d.* represents "interest wrongly paid or credited to you in respect of the said "sum of 17,353*l.* 7*s.* 11*d.* Particulars of the items making up "the said sum of 17,353*l.* 7*s.* 11*d.* are annexed hereto."

A summons was issued in the winding up of the company against the liquidator of the company in which the appellant sought the following relief: "That the decision of the liquidator in respect of the applicant's proof of 53,361*l.* 14*s.* 11*d.*, "whereby he rejected such proof to the extent of 18,254*l.* 7*s.* 3*d.* "may be reversed or varied and that the said proof may be "allowed in full."

Bennett J. held that the appellant was not entitled to recover the money so advanced. The secretary had no power to borrow on behalf of the company, and the company could not be held liable to repay money paid for its benefit at the request of its secretary; the request not having been made or confirmed by a properly constituted meeting of the directors, the company did not know of and acquiesce in the payments being made for its benefit.

The appellant appealed. The appeal was heard on October 13, 14, 17, 1938.

F. R. Evershed K.C. and *Roger Turnbull* for the appellant. It is admitted that the company benefited by the advances. Inasmuch as they were made for its benefit they came within the scope of art. 116 and the resolution confirming them was in respect of an " arrangement for giving a director security "for advances or by way of indemnity" and, therefore, valid though one of the two directors voting was an interested party. The company was merely recognizing its liability. If the subsidiary companies had placed their difficulty before the company and the appellant had offered to advance money to them, the company would have agreed to indemnify him. That was in effect the position save that the matter came before the board after the advances had been made. Further, in the accounts placed before the shareholders, the sums advanced were included among the liabilities.

The request of the secretary must here be taken as the request of the company. But in any case the facts came within the principle stated in Smith's Leading Cases, 13th ed., vol. i., p. 156: " If a person knows that the consideration is being "rendered for his benefit with an expectation that he will "pay for it, then if he acquiesces in its being done, taking "the benefit of it when done, he will be taken impliedly to have "requested its being done: and that will import a promise to "pay for it." See also Leake on Contracts, 8th ed., p. 44. The company knew of these advances since where there are only two directors of a company notice given to one executive officer is notice given to the company. The payments were made for the company's benefit, since it was liable under the guarantees and it does not matter whether they were made to the company itself or to the subsidiaries. They were made in expectation of repayment by the company.

The appellant is entitled to repayment on grounds of fairness and justice. It would be unconscionable of the shareholders to take advantage of the money paid by him to clear the company of its liabilities, without making repayment. Even where such a transaction is irregular, the party benefiting must repay: *In re Cork and Youghal Ry. Co.* (1) Lord Hatherley L.C. there rested his decision on a sort of equity. See also *Reid* v. *Rigby & Co.* (2) Even where a managing director is acting wrongfully in borrowing money on behalf of the company and that fact is known to the parties from whom he borrows, yet they have a claim against the company: *Reversion Fund and Insurance Co., Ld.* v. *Maison Cosway, Ld.* (3) The fact that the appellant knew that the secretary and Kelly had not authority from the company to borrow does not affect his claim. *B. Liggett* (*Liverpool*), *Ld.* v. *Barclays Bank, Ld.* (4) shows that a third party discharging the debt of another can stand in the place of the creditor. On equitable principles the appellant is entitled to his action at law.

Further, the appellant is entitled to succeed on the principle of equity stated by Romer L.J. in *Bannatyne* v. *D. & C. MacIver* (5): " Where money is borrowed on behalf of a "principal by an agent, ... though it turns out that his "act has not been authorised, or ratified, or adopted by the "principal, then, although the principal cannot be sued at "law, yet in equity, to the extent to which the money borrowed "has in fact been applied in paying legal debts and obligations "of the principal, the lender is entitled to stand in the same "position as if the money had orginally been borrowed by "the principal." See also *In re Airdale Co-operative Worsted Manufacturing Society, Ld.* (6); *Sinclair* v. *Brougham* (7) and *A. L. Underwood, Ld.* v. *Bank of Liverpool and Martins.* (8)

Lionel Cohen K.C. and *K. W. Mackinnon* for the respondent. If the principle obliging the company to repay moneys paid for its benefit is applicable, it can only apply in the case of debts for which the company is liable on its guarantees.

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(1) (1869) L. R. 4 Ch. 748, 757, 759.
(2) [1894] 2 Q. B. 40.
(3) [1913] 1 K. B. 364.
(4) [1928] 1 K. B. 48.
(5) [1906] 1 K. B. 103, 109.
(6) [1933] Ch. 639.
(7) [1914] A. C. 398.
(8) [1924] 1 K. B. 775.

Therefore, the payments to the electricity company and to the firm of solicitors are not within its scope.

The short answer to the applicant's contention is the distinction between cases where the money in question has gone into the coffers of the company actually or notionally and cases where the payments could not give rise to any claim for breach of trust. When a company has had the property in question in its possession, it can be made liable on that principle, but otherwise it cannot: *Sinclair* v. *Brougham* (1); *In re Airdale Co-operative Worsted Manufacturing Society, Ld.* (2); *Falcke* v. *Scottish Imperial Insurance Co.* (3) The highwater mark in favour of the appellant is *B. Liggett (Liverpool), Ld.* v. *Barclays Bank, Ld.* (4), and that does not bind the Court of Appeal.

A person who pays the debt of another without his request cannot recover the amount paid from the debtor. There is no distinction between paying the debt of another and paying money for his benefit so far as this principle is concerned. This money was not paid at the request of the company, which had no knowledge of the transactions through any person competent to bind it. The fact that the secretary had notice does not help the appellant. He could not assume that the secretary had communicated the transactions to the company, because he knew in fact that no communications had been made to persons capable of binding it. Neither was there any acquiescence on the part of the company. The company throughout this matter never acted as a juridical persona and the advances made were purely voluntary and gratuitous. There is no implied contract to repay at common law and the appellant has no claim under any equitable doctrine.

1938. Nov. 25. SIR WILFRID GREENE M.R. The appellant was at all material times one of the two only directors of Cleadon Trust, Ld., which I will refer to as "the company." The company owned shares in and all the debentures of two subsidiary companies, namely, Carlisle (Builders), Ld. (incorporated in 1926), and the Property and Building Corporation, Ld. (incorporated on October 24, 1930), which I will refer to as "Carlisles" and "P. B. C." respectively. The boards of all three companies were the same and a Mr. Antrobus was in each case the secretary. Previously to August 6, 1931, a Mr. Jackson was the other director and managing director of all three companies. After that date his place as director was taken by a Mr. Kelly, but there was no managing director of any of the three companies.

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(1) [1914] A. C. 398.
(2) [1933] Ch. 639.
(3) (1886) 34 Ch. D. 234.
(4) [1928] 1 K. B. 48.

For some time before the events which give rise to the present claim the appellant had been in the habit of advancing large sums to the company at the request of Mr. Jackson, its managing director. On one occasion at least, namely, on October 27, 1929, at the like request, a sum was paid by the appellant to Carlisles upon the footing that the company should be liable to repay the amount to the appellant. All sums so provided by the appellant were entered in a ledger account in the appellant's name in the company's books. After Mr. Jackson left the company the appellant continued to make advances to the company. He also provided certain sums of money for the subsidiaries in the circumstances hereinafter stated. In the case of the advances made and the sums provided while Mr. Jackson was managing director there may have been a binding obligation on the company to repay, since the transactions may have been within the scope of a managing director's authority. I refer to this point later. But in the case of the advances made and the sums provided after Mr. Jackson's departure no binding contract could be made for reasons which will appear. No question arises on this appeal as to the right of the appellant to prove in respect of sums actually received by the company. The appeal relates solely to sums provided for the subsidiaries in the circumstances which I will now explain.

The two subsidiary companies were interested in a block of flats called Tufton Court. In the years 1930 and 1931, these flats were being constructed by a building company called Hammond and Barr, Ld., which I will refer to as "the "builders." In the first instance Carlisles had entered into a contract with a Mr. Warwick Brookes, who at that time was the building lessee, to provide him with moneys which he required in order to pay the builders their instalments under the building contract which he had made with them. The performance of this contract by Carlisles was guaranteed by the company by a document of October 3, 1930, addressed to Mr. Warwick Brookes, which I will refer to as "the first "guarantee." Subsequently the interest of Mr. Warwick Brookes was taken over by P. B. C., who became liable to pay the builders, and their liability was guaranteed by the company by a document of April 9, 1931, addressed to the builders, which I will call "the second guarantee." The flats were completed and a lease of them was taken by P. B. C. During the construction of the flats sums of money became due to the builders which fell to be found by Carlisles during the currency of the first guarantee and by P. B. C. during the currency of the second guarantee. Neither the subsidiary companies nor the company had the necessary funds, and the appellant from time to time provided money for the purpose. He did so in the first two cases at the request of Mr. Jackson, and in the remaining cases at the request of Mr. Antrobus with the knowledge and approval of Mr. Kelly. The sums so provided for payment of the builders were eight in number. The first was a sum of 2000*l.* provided while Mr. Jackson was managing director on January 2, 1931, that is, during the currency of the first guarantee when the money for payment of the builders fell to be found by Carlisles. The other seven amounting in all to 13,875*l.* were provided during the last six months of 1931, that is, during the currency of the second guarantee when the money for payment of the builders fell to be found by P. B. C. The earliest of these seven payments, namely, 2500*l.* on July 29, 1931, was made while Mr. Jackson was managing director; the remaining six were made after he had left. In view of the inability of the two subsidiary companies to find the sums which fell to be found by them respectively, the company would have been liable to find them under the guarantees, but it had no money available for the purpose. When the appellant provided these sums it was understood and arranged between himself and Mr. Jackson (in the case of the two earliest payments) and between himself and Mr. Antrobus (in the case of the other six payments) that they were to be treated as advanced by the appellant to the company. The amounts were accordingly entered in his ledger account and were debited to the subsidiaries respectively in the company's books. In the case of the last six payments Mr. Kelly knew of and assented to the arrangement. Interest on the sums in question was from time to time paid to the appellant by the company or credited to him in account. The amounts were provided in each case by cheque drawn by the appellant on his bankers. The cheque for 2000*l.* was drawn in favour of the company, it was apparently endorsed by some person purporting to act on behalf of the company whose identity was not ascertained by the evidence—for the cheque was not produced—and paid into the banking account of Carlisles, who used it towards paying to the builders a sum of 2125*l.* then due to them under the architect's certificate. The remaining seven sums were provided by cheques drawn in favour of the builders and sent to them through P. B. C. presumably, by Mr. Antrobus, who was, as I have already stated, the secretary of that company also. The statement in Bennett J.'s judgment that these seven sums were paid to P. B. C. by cheques drawn in favour of that company is due to a misapprehension on his part. The amounts of these eight payments amounting together to 15,875*l.* form the greater part of a sum of 17,353*l.* 7*s.* 11*d.* for which the appellant claims to be entitled to prove in the voluntary winding-up of the company. The liquidator rejected the claim for this amount and his decision was upheld by Bennett J. The rest of the sum of 17,353*l.* 7*s.* 11*d.* I will deal with later.

The company and its two subsidiaries are in liquidation. Such assets as the subsidiaries may have are insufficient to discharge the amounts owing on their debentures and accordingly any claim which the appellant might have had against them is worthless. The result of the payments made by the appellant was in each case to extinguish a debt, for which in the first case Carlisles, and in the other seven cases P. B. C., were liable, and the extinction of those debts operated to relieve the company of the corresponding liability under its guarantee. If the appellant's claim fails, the shareholders of the company will benefit by the payments which he made, for if the money had been found by the subsidiaries themselves (assuming that to have been possible) the assets of those companies would have been depleted and there would have been less to come from them to the company as the holder of all their debentures; if, on the other hand, the company had found the money as guarantor, its own assets would have been diminished, since claims by the company against the subsidiaries as principal debtors for recoupment would, on the facts, have been valueless.

The fact that the first two payments were made upon the request of Mr. Jackson, who was then still managing director, was not relied upon before us, all the eight payments being treated upon the same footing so far as regards the existence of any person capable of binding the company. Upon the view which I take it is not necessary to consider whether or not in those two cases the company became contractually bound and I will deal with them without reference to Mr. Jackson's possible authority as managing director.

If the company had had an independent board of directors and that board had requested the appellant to provide these sums or had known of and acquiesced in their provision, the appellant's claim in the circumstances stated would have been a good one. But there was no such board, since of the only two directors one, the appellant, was interested and by art. 124 of the company's articles of association two directors were necessary to form a quorum. An attempt was made to avoid this difficulty by means of art. 116 coupled with what purported to be a resolution of the board of directors of the company passed on December 5, 1932. Under that article the common prohibition against voting by an interested director is declared not to apply to " any arrangement for "giving a director security for advances or by way of "indemnity." The resolution purported to "confirm" the "advances" to P. B. C. by the appellant, which were said to have been made "at the request of the Cleadon Trust, Ld." It was said in the first place that the arrangement by which the appellant was to be treated as having advanced the sums in question to the company was "an arrangement for giving "a director security for advances" and that the approval of his co-director was sufficient to give it validity. It was said in the second place that it was an "arrangement by way of "indemnity." I cannot accept either of these arguments. With regard to the former, it is sufficient to point out that there was never any "advance," since in order that there might be an advance a resolution of an independent board was required. With regard to the latter, the words on their true construction mean, in my opinion, not "arrangement "by way of indemnity," but "an arrangement for giving a "director security by way of indemnity" and the facts of the present case cannot be brought within that expression.

This brings me to the substantial questions in the case. It was argued that the facts of the present case brought it within a principle which for present purposes I can take as stated with sufficient accuracy in vol. i. of Smith's Leading Cases, 13th ed., p. 156. It is there said that "if a person "knows that the consideration is being rendered for his "benefit with an expectation that he will pay for it, then "if he acquiesces in its being done, taking the benefit of "it when done, he will be taken impliedly to have requested "its being done; and that will import a promise to pay "for it." In my opinion, the facts of the present case are not sufficient to bring this principle into play. Two things at least are essential for its application—namely, knowledge and acquiescence on the part of the person sought to be charged with liability. The knowledge required must, I think, be knowledge which will lead to the possibility of effective action by refusing to accept liability. In the present case the company had no such knowledge, for of its three officers who knew the facts one, the appellant, was disqualified from taking part in any decision on the matter,

C. A.
1938
CLEADON TRUST, LD., *In re.*
Sir Wilfrid Greene M.R.

another, his co-director, could not alone come to any decision, while the secretary had no power at all in the matter. It was suggested that the other director could have taken action by calling a meeting of the company and submitting the question to it. This argument is, in my opinion, unsound. But apart from the question of knowledge, there was not and could not have been any acquiescence by the company in the absence of an independent board.

But this does not dispose of the matter, since the appellant relies upon a principle of equity under which a person who has advanced money to pay the debts of another may in certain circumstances be entitled to claim repayment against that other, notwithstanding that no liability to repay exists at law. This aspect of the case is not dealt with in the judgment of Bennett J. I proceed to examine the nature and scope of this principle and the authorities in which it has been discussed and applied. Three lines of authority were referred to of which two have, in my opinion, no immediate relevance to the present question. Of these two, one is concerned with corporations which, having exhausted their borrowing powers, borrow money from a lender and apply it in payment of existing debts lawfully incurred. In such cases the lender can recover from the company the amount so applied. An example is to be found in *In re Cork and Youghal Ry. Co.* (1) The principle underlying these cases has not yet been finally ascertained—it may be that the borrowing ought not to be treated as ultra vires the company at all, or it may be that the lender is subrogated to the rights of the creditors who have been paid off: per Lord Parker in *Sinclair* v. *Brougham.* (2) Whichever view be the right one, I do not find any assistance in these decisions.

The other line of cases is that of which *Sinclair* v. *Brougham* (3) is itself the leading example. That was a case in which persons had deposited money with a building society in the course of a banking business which it was carrying on ultra vires. In the winding-up of the society the question

(1) (1869) L. R. 4 Ch. 748.
(2) [1914] A. C. 398, 441.
(3) [1914] A. C. 398.

arose whether the depositors were entitled to make claims upon the assets in the hands of the liquidator. The argument that the depositors were entitled at law to recover the amounts of their deposits as money had and received having failed, the question arose what rights, if any, they had against the surplus assets remaining after the creditors had been paid. While it was recognized that a person who had handed over money or property to a corporation lacking the necessary powers to enter into the transaction under which it was received was at law entitled to follow the money or property so long as it retained its identity, the difficulty arose that the money paid in by the depositors had upon the facts lost its identity as specific property, with the result that the depositors could not point to any specific asset the property in which lay in them. Accordingly there existed no remedy at law. But the difficulty was overcome by applying the principle of equity under which trust moneys can be traced into an account in which they have been mingled with other moneys, the owner of the trust moneys being treated as having a charge on the blended fund. The principle was applied by treating the society and its agents who received the deposits as trustees for the depositors from the moment of receipt. I have endeavoured to summarize the reasoning of Lord Haldane L.C. and Lord Parker in that case, and it does not appear to me that the principles enunciated in that case are sufficient to solve the present problem. Those principles belong, it may be said, to the same family as those laid down in the third line of cases to which I will presently turn. They both illustrate the method by which equity in certain circumstances will assist a person who has no right at law but is able to show that money belonging to himself has gone to swell the assets of the person to or for whose benefit he has paid it. It is, of course, important to see that the operation of these principles is kept within proper limits, having regard to the general rule that where "money is "expended for the benefit of another person under such "circumstances, that he cannot help accepting the benefit, ". . . . he has no opportunity of exercising any option, and "he will be under no liability": per Brett M.R. in *Leigh* v. *Dickeson.* (1)

The third line of cases is illustrated by *Bannatyne* v. *D. & C. MacIver* (2); *Reversion Fund and Insurance Co., Ld.* v. *Maison Cosway, Ld.* (3), and *B. Liggett (Liverpool), Ld.* v. *Barclays Bank, Ld.* (4) I take the principle applied in those cases from the judgment of Romer L.J. in *Bannatyne* v. *D. & C. MacIver* (2), omitting certain words which were held by this Court in the *Reversion Fund and Insurance Co., Ld.* v. *Maison Cosway, Ld.* (3) case to be unnecessary to the decision. The learned Lord Justice says: " Where money is borrowed on "behalf of a principal by an agent, ... though it turns out "that his act has not been authorized, or ratified, or adopted "by the principal, then, although the principal cannot be "sued at law, yet in equity, to the extent to which the money "borrowed has in fact been applied in paying legal debts "and obligations of the principal, the lender is entitled to "stand in the same position as if the money had originally "been borrowed by the principal."

This rule is not based upon the absence of borrowing powers in the principal, for it is applicable where the principal has power to borrow but the agent borrows in excess of his authority. Its application in the case of partners is discussed in Lindley on Partnership, 10th ed., p. 251.

The real question in the present case, in my opinion, is whether or not its facts bring it within this rule. If the company had itself been indebted to the builders as sole or principal debtors and the secretary had borrowed money from the appellant having no authority to do so, and if the money so borrowed had been applied in payment of what was due to the builders, the case would have fallen within the language of Romer L.J. and the appellant would have been entitled to stand in the same position as if the money had been borrowed by the company. But the facts were not as supposed, and it is necessary to consider whether, in spite of the points of difference, the principle still applies. The first point of difference is that the money was not, strictly speaking, borrowed at all in the sense that it went into the coffers of the company. Except in the case of the first cheque, the request was for payment direct to the builders. Nevertheless, this difference is not, in my opinion, one of substance. I cannot see that it makes any difference whether the agent obtains the money himself from the lender or requests the lender to make the payment direct to the principal's creditor. In each case, if the agent had in fact had authority, the principal would have become liable to the lender, and if the lender is entitled to recover in the one case in spite of the absence of authority, I can see no logical reason why he should not be similarly entitled in the other. I should say here that the facts appear to me to show that the secretary (or in the case of the first two advances, Mr. Jackson) in asking the appellant to provide the money, and the appellant in so providing it, were both acting upon the footing that the money was being provided for the company itself in order to enable it to discharge or forestall the incidence of its liability as guarantor, and not for the subsidiary company concerned. It is true that in the case of the first cheque for 2000*l.* the money was in fact received by Carlisles and used by them to pay the builders, but this, in my view, is on the facts a matter of form and not of substance.

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(1) (1884) 15 Q. B. D. 60, 65.

(2) [1906] 1 K. B. 103, 109.

(3) [1913] 1 K. B. 364.

(4) [1928] 1 K. B. 48.

My view that the rule in question applies to cases where the lender pays the creditor direct is, I think, supported by the decision of Wright J. (as he then was) in *B. Liggett (Liverpool), Ld.* v. *Barclays Bank, Ld.* (1) That was a case where a bank honoured cheques drawn upon a company's account by one director alone, the signature of two directors being required by the regulations of the company. The cheques were used in payment of debts of the company and the bank claimed to be entitled to debit the company's account, notwithstanding that the cheques were to its knowledge irregular. Upon the assumption that the company's account was in debit, each cheque would have been a request for a loan and the case would have fallen exactly within the

(1) [1928] 1 K. B. 48.

principle as enunciated by Romer L.J. But upon the assumption that the account was, at the time when any particular cheque was honoured, in credit, the position was different. I am not sure, if I may respectfully say so, that I agree with all the observations made by the learned judge in the part of his judgment which deals with the case on this assumption, but I entirely agree with the result. I should have thought that when the bank paid the company's creditor on a cheque drawn when the account was in credit, it was doing nothing more than using its own money to pay the creditor at the request of an agent of the company who had no authority in that behalf. Ex hypothesi the cheque qua cheque did not justify the bank in debiting the company's account with the amount paid, and what Wright J. describes as a "misapplication "of credits" (1) was, so far as the cheque was concerned, completely unjustified. The debit entry appears to me to have been justified because the bank made the payment to the creditor of the company at the request of a person purporting to act on behalf of the company, in spite of the fact that to the knowledge of the bank he had no authority.

But there is a more important point of difference between the facts of the present case and those of the case assumed above. The debts which were discharged by the use of the appellant's money were not the company's debts at all; they were the debts of the subsidiaries and the company's only liability with regard to them was that which existed under the guarantees. But the discharge of the debts operated to extinguish that liability pro tanto and it is not disputed upon the facts that, as I have stated earlier in this judgment, the company's assets would have been so much the less if the payments had not been made. It appears to me, therefore, that this is a case where the appellant's money has been used to get rid of a liability of the company with a consequential and corresponding benefit to the company whose assets would otherwise have been depleted.

For these reasons I am of opinion that the appellant is entitled to succeed on this branch of the case. The position

(1) [1928] 1 K. B. 48, 63.

would, I think, have been different if at the time of the payments the subsidiaries had themselves been in a position to find the money. Had this been so, no benefit would have resulted to the company from the payments, since its liability under the guarantees would never have come into effective operation. The payments would no doubt have extinguished that liability, but the benefit resulting to the company from such extinction would have been purely nominal.

With all respect to those who think otherwise, I do not take the view that the principle which I have been discussing applies only in cases where the creditor has been in fact paid by the hand of a person having a general authority to pay the principal's debts. There are, no doubt, weighty reasons which support this view. But I am unable to find that this has ever been considered to be a requirement in cases where the principle has been discussed, although there may be other cases on the subject which I have not examined. Were such a requirement essential, it would, of course, greatly limit the application of the principle. For instance, if a director, having no authority to borrow on behalf of his company, borrowed money from a third person and himself applied it in payment of the company's debts, having no general authority to pay debts—and a director as such has not that authority—the third person could not recover. If, on the other hand, the director, having obtained the money, handed it to the company's cashier, he being a person with general authority to pay the company's debts, and the cashier used the money to pay the debts, the company would be liable. This result appears to me to be an anomalous one. Moreover, I cannot myself see how the decision in *B. Liggett (Liverpool), Ld.* v. *Barclays Bank, Ld.* (1) could be supported, for the company's debts in that case were not paid by any agent of the company having authority to pay debts, but by the bank out of its own money. The sending of the cheques to the company's creditors by the director who signed them was not a payment of the company's debt at all, because the cheques, as cheques, were irregular and it was the bank's duty to refuse to honour them. On the other hand, the cheques, although bad cheques, were treated as requests by the director to the bank to discharge the company's debts and the director had no authority to make any such request. The principle is an old one. As was pointed out by Romer L.J. in *Bannatyne* v. *D. & C. MacIver* (1), examples of its application are to be found in cases where a third person provides money for the purpose of paying for necessaries for a married woman. In such a case the husband was not liable at law, but he was liable in equity. An example of this is to be found in *Jenner* v. *Morris.* (2) There Lord Campbell L.C. said: "Courts of "law will not recognise any privity between the husband and "a person who has supplied his wife with money to purchase "necessaries, or pays the tradespeople who have furnished "them. Nevertheless, it has been laid down from ancient "times that a court of equity will allow the party who has "advanced the money which is proved to have been actually "employed in paying for necessaries furnished to the deserted "wife, to stand in the shoes of the tradespeople who furnished "the necessaries, and to have a remedy for the amount "against the husband. I do not find any technical reason "given for this; but it may possibly be that equity considers "that the tradespeople have for valuable consideration "assigned to the party who advanced the money the legal "debt which would be due to them from the husband on "furnishing the necessaries, and that, although a chose in "action cannot be assigned at law, a court of equity recognises "the right of the assignee." It is to be noticed that Lord Campbell here in stating the principle refers not only to the case where the money is actually supplied to the wife, but also to the case where the person providing the money pays the tradespeople direct. The wife had no authority to require such payment and, although she had authority to provide herself with necessaries and to pay for them, in the second case mentioned by Lord Campbell it was not she that made the payment at all. It is, I think, fair to observe that the precise ground upon which the equity is based has not been finally stated. It may be that it is a mere anomaly. Such anomalies are to be found at law in some cases of quasi contract. The fact is that our law did advance in certain respects some way towards recognizing a doctrine of unjust enrichment, but the process was stopped short, leaving certain anomalies based on ancient authority embedded in the law. It may be that this principle of equity is to be explained on the same ground. The principle, as I understand it, appears to me a beneficient one and I should be sorry to see its application cut down in the manner suggested.

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(1) [1928] 1 K. B. 48.

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(1) [1906] 1 K. B. 103, 110.

(2) (1861) 3 De G. F. & J. 45, 51.

The remaining items in the claim fall into two classes. One class can be dealt with shortly. It consists of (*a*) a sum of 62*l.* 3*s.* 7*d.* provided by the appellant for paying a debt due from P. B. C. to the electricity company supplying Tufton Court; (*b*) an item of 216*l.* 4*s.* 4*d.* provided by the appellant for paying a debt due from Carlisles to a firm of solicitors. In neither case was there any liability of the company itself and the fact that the company indirectly obtained a benefit through the help thus given to its subsidiaries is not sufficient to give the appellant any claim against it.

The other class consists of three sums amounting together to 1200*l.* paid by the appellant to Carlisles in July, August and November, 1932. The evidence with regard to these sums is incomplete, but they were treated before us as having been provided by the appellant upon the request of Mr. Antrobus in the same way as the sums dealt with in the earlier part of this judgment. Entries with regard to them appear in the appellant's ledger account. These sums were paid into Carlisles's banking account which, as Mr. Lionel Cohen on behalf of the liquidator admitted, was in debit throughout the material time. The balance sheet of the company for the year ending March 31, 1932, contains a statement that the company had given an unlimited guarantee of the overdraft of Carlisles and Mr. Lionel Cohen admitted that this guarantee had in fact been given and was subsisting when the payments in question were made. These facts, in my opinion, bring these payments under the same principle as that which I have already held to be applicable to the payments first discussed.

There is also a claim to prove for interest, but this was not pressed, and there is, in my opinion, no ground upon which it can be supported.

In the result I would allow the appeal to the extent of 17,075*l*. But as the majority of the members of the Court have come to a different conclusion on the main question the appeal is dismissed with costs.

SCOTT L.J. I have had the privilege of reading the written judgments of my colleagues, both that which the Master of the Rolls has just read and that which Clauson L.J. is about to read. They differ. The Master of the Rolls would allow the appeal. Clauson L.J. would dismiss it. With some diffidence but no doubt I agree with Clauson L.J. The question for determination is whether the appellant had at the date of the winding-up of the Cleadon Trust, Ld. (to which I also will refer as " the company "), good causes of action against the company at common law or, alternatively, in equity, for reimbursement of thirteen sums of money which he had provided out of his own pocket for the purpose of paying current debts of two subsidiary companies wholly owned by the company. The Master of the Rolls has stated the facts and, subject to one question in regard to items 1 and 2, I concur in his view that in ultimate analysis of the evidence all thirteen items appear to be legally similar in circumstance. In each case the appellant provided the money by cheque upon his bank. In the first case the appellant's cheque was cashed by the subsidiary, who a little later paid to the creditor a slightly larger amount. In each of the other twelve cases the cheque came to the hands of a creditor of one of the subsidiaries for that precise amount ; the creditor cashed it, credited the subsidiary with the proceeds, and treated the debt as paid. The salient fact upon which the judgment of the Master of the Rolls has turned is that each debt so paid was covered by one or other of three guarantees of payment given by the company to the subsidiary's creditor so that, had the creditor not received payment, the company could and would have been liable on its guarantee; and as the company not only owned all the shares of each subsidiary, but also had debentures covering all its assets and to an amount exceeding their value, the company's right of recourse against the subsidiary as principal debtor was worth nothing. Whilst I agree with the Master of the Rolls in these conclusions of fact, I regard as equally important the evidence relating to the constitution and position of the company and the conduct of the appellant at the material times. The company's articles of association provide (1.) that the business of the company shall be managed by the directors; (2.) that a quorum of two is necessary "until otherwise determined"—no such determination was proved; (3.) that the directors may appoint a managing director—there was one till August 6, 1931, but I agree with the Master of the Rolls that he does not really come into the picture, except possibly on items 1 and 2, on which I will speak presently. I agree, too, with the Master of the Rolls' reasons for deciding that art. 116 does not cure the appellant's disqualification for interest. The result is that, so far as every one of the appellant's claims is concerned, the company had only one effective director and was thus deprived of the possibility of a quorum; from which flows the legal corollary that in any matter in which action by the company, that is by the juridical persona, was necessary, it could not act at all. It was still the outer shell of a persona, but it was paralysed and could neither request nor agree nor instruct nor authorize—in short, could not do anything within the sphere of management of the company's business: it was the negation of a real person except, I suppose, in regard to ownership of its property and routine action by servants, and of course transactions outside the vitiating reach of the appellant's disqualification. In so far as it is material, the same commentary presumably applies to each of the two subsidiaries.

The three companies all had the same office and Mr. Antrobus was secretary of all three. There was no evidence of his being given any managerial powers: he remained a mere secretary so far as his authority and duties were concerned. He therefore had no power to do any of the following things: (*a*) to make any request on behalf of the company for a loan to itself or an advance to a third party; (*b*) to make any such agreement for the company; (*c*) to record the transactions in the company's books as loans to the company; (*d*) to endorse the company's name on the cheque in the case of item No. 1, drawn in favour of the company; (*e*) to send on that cheque, or any of the appellant's other cheques, however drawn, to a subsidiary company or to that company's creditor. It is further to be observed that, when Mr. Antrobus did any of the things he did in connection with the advances, there is nothing in the evidence to show that he was either intending or professing to act for the holding company rather than the subsidiary; and, in the absence of such evidence, I think the burden of proof resting on the appellant that Mr. Antrobus even purported to act for the company rather than the subsidiary, for example in sending on the cheques, remains undischarged. If such proof was a material element in the appellant's cause of action, the learned judge was necessarily right in dismissing his claim.

The appellant held the controlling interest in the company and in my view it is apparent from the transcript of evidence that he exercised a dominant control in the administration of the affairs of the company and also of its two subsidiaries, practically to the extent of treating the businesses of the company and its two subsidiaries as one business belonging to himself. I think it is a proper inference from the evidence that the various advances (other than the first two which were arranged with Mr. Jackson) were arranged exclusively between himself and Mr. Antrobus, the secretary of all three companies. Mr. Kelly, his co-director, is said to have had knowledge of some or all of the transactions; but the effect of the evidence on my mind is that the appellant looked to Antrobus to tell him what money was needed for the subsidiaries; that he then obtained such further information as he thought fit from Antrobus; and upon that decided what advances he considered it desirable to make and directed Antrobus to deal with the cheques accordingly and to record the advances as loans by himself to the company in the company's ledger.

In at least one aspect it is relevant also to draw attention to the legal irregularity of the course of conduct followed by the appellant himself in relation both to the Cleadon Trust, Ld., and, presumably, also to the subsidiaries. It is obvious that he was throughout the whole thirteen transactions flagrantly disregarding the provision of the Companies Act and of the articles of association which entrusted the whole management of the company's business to the directors, acting through a quorum of two; he was also guilty of interfering improperly and without authority with the secretary and giving him orders which he had no right to give. The privilege of limited liability which Parliament has given to members of companies registered under the Companies Acts is given upon the footing of conditions the observance of which by directors is of general importance to the public, especially in these "one" or "two men" small private companies, where the absence of publicity makes due compliance with the law all the more important. It is Mr. Evershed's common law submission which makes the appellant's conduct relevant. That submission is that the appellant is entitled to succeed because repayment was in "fairness and justice" due to him, that being the principle, Mr. Evershed contends, which is embodied in the class of common law causes of action known as "contracts implied by law," on which he relies. If that principle or anything like it could be established as law to-day, the conduct of the appellant would be germane to the inquiry, in that it might well be regarded as neither "fair nor just" for the Court to reward such misconduct by extending its help. But apart from these considerations, both of the appellant's grounds of claim, common law and equity, are affected by two fundamental conclusions of fact to be drawn from the evidence: (1.) that the company as a juridical persona took no action whatsoever; it could take none and was therefore wholly impassive; and (2.) that the appellant's advances so far as the company was concerned were purely voluntary and gratuitous.

In spite of the fact that all three members of this Court are in agreement that the claim at law is bad, I think that Mr. Evershed is entitled to some statement of our reasons, so I will give mine shortly. In his argument upon the common law aspect he did not distinguish between the two senses of the legal phrase "implied contracts"—namely, (*a*) a real consensual contract inferred as a conclusion of fact from the conduct of the parties and other circumstances of the case, though not expressed in words written or spoken, and (*b*) the so-called "contract implied in law" where there is no agreement in fact, but none the less a right of action, evolved by the common law Courts on so-called "equitable" principles at a time when they had no equitable jurisdiction—the "implied contracts" which Leake explained so clearly in the first edition of his book on Contracts, published in 1867, and in the third edition of Bullen and Leake, published in 1868. In these latter causes of action there was no consensual element whatever; although the indebitatus count for "money "paid at request" which lay where a real request could be inferred, was also used in the permitted types of claim for money paid where there was no possibility of any request in fact. Whether Mr. Evershed intended to keep (*a*) and (*b*) separate or not, I am not sure, but it is obviously impossible, for the reasons already stated by the Master of the Rolls, that a consensual contract within class (*a*) should be inferred by the Court from the facts of the present case. Neither "request" nor "acquiescence" can be found as a fact on the part of the company. Having no quorum of directors, it could have neither will, nor intention, nor choice, and it could not acquiesce any more than it could dissent or protest. It follows that class (*a*) of implied contracts, the consensual kind, is ruled out.

Mr. Evershed relied for authority on a passage in Smith's Leading Cases, 13th ed., vol. i, p. 156, which is as follows: "But "if a person knows that the consideration is being rendered for "his benefit with an expectation that he will pay for it, then "if he acquiesces in its being done, taking the benefit of it "when done, he will be taken impliedly to have requested "its being done." This passage must, I think, be regarded as relating solely to contracts implied in fact and not as touching contracts implied in law. The distinction was emphasized by Bayley B. in the case of *Paynter* v. *Williams* (1), the second of the two authorities cited in Smith's Leading Cases in support of the text. The other case cited is *Falcke* v. *Scottish Imperial Insurance Co.* (2), where the Court refused to draw the inference of any actual contract. Bowen L.J. pointed out (3) that knowledge was not of itself enough, and explained the limits of such an inference. But I do not think that Mr. Evershed was seriously contending for a contract implied in fact. I understood him to rely really on the semi-equitable doctrine of the contract implied in law; for it is to this class of action alone that the passage from Leake on Contracts, 8th ed., p. 44, which he read to us relates. It includes the following sentences: "The trans- "actions which give rise to contracts of this kind" [contracts implied in law] "may be described generally as importing "that some undue pecuniary inequality exists in the one "party relatively to the other, which the law recognises as "requiring compensation upon equitable principles; and the "law not only imposes a debt, but further implies a promise "to pay the debt . . . . The promise here implied is, how- "ever, a fiction of law, and therefore requires to be distin- "guished from the implied promises already mentioned, in "which the promise is an implication or inference of fact." This language is almost identical with that of the first edition, published in 1867, at p. 74, which is the locus classicus of exposition upon that interesting though small branch of our common law and is undoubtedly good law as applied to the cases there cited. Mr. Evershed boldly submitted that the appellant's case fell exactly within it and that accordingly he was entitled to his action at law "upon equitable principles." It is plain that the appellant's case does not fall directly

(1) (1833) 1 C. & M. 810, 820.
(2) (1886) 34 Ch. D. 234.
(3) Ibid. 249, 250.

within any one of the various types into which common law actions for money paid, as illustrated by the decided cases, were divided in Leake's first edition, pp. 40 to 46, a classification repeated in subsequent editions. Nevertheless, Mr. Evershed contended, with at least sufficient insistence to keep the argument open in the House of Lords, that the present is a case covered by the principle of fairness and justice indicated in Leake's statement as the basis of the common law action—something akin to, though not identical with, the continental doctrine of unjust enrichment. I therefore feel that the appellant is entitled to a reasoned decision upon it, however shortly explained.

As the law stands to-day, it is no doubt difficult to formulate any one principle which will unify all the recognized types of common law actions upon contracts implied in law, or even upon the actions for money paid. It may even be the right view, as Lord Sumner rather suggested in *Sinclair* v. *Brougham* (1) that all these old common law causes of action are to be regarded as just curious survivals of past legal history, stereotyped within the rigid boundaries of the particular facts of the decided cases, but resting on no general principle capable of wider application. There has, however, been a good deal of discussion recently on the subject by jurists; for example, Professor Winfield's "The Province of "the Law of Tort" (1931), pp. 167 to 176, and his "Law of "Tort" (1937), pp. 697 to 700; Mr. Jackson on "the History "of Quasi-contract" (1936); and in the pages of the Law Quarterly Review, by Mr. Jackson, vol. 53, p. 525, and by Dr. C. K. Allen, vol. 54, p. 201; and I for one should be sorry to think that the common law is condemned out of hand to no further growth in this field. The fact that little development has occurred since the sixties of last century may well be an indirect result of the amalgamation of common law and equity under the Judicature Acts. As the common law judges had so often spoken of "equitable "principles" in cases of "contracts implied in law," it was only natural that when they became entitled to apply equity

(1) [1914] A. C. 398, 452.

they should resort to it for the solution of new cases not directly covered by existing decisions at law. But whatever the explanation, it is clearly impossible to-day to accept Mr. Evershed's submission that the common law recognizes any rule of justice and fairness prima facie applicable to the present case.

In any event there are two further answers to his common law claim. The facts of the case bring it exactly within the excluding rule about voluntary payments on p. 46 of Leake: " A payment made voluntarily and without any legal "liability or compulsion, in discharge of the debt or liability "of another, raises no implied contract for repayment." The leading authority quoted on that page of the first edition was *Exall* v. *Partridge* (1) per Lord Kenyon C.J., the same authority as was cited for the same purpose by Wright J. in *B. Liggett (Liverpool), Ld.* v. *Barclays Bank, Ld.* (2) The second is the same answer as Clauson L.J. and I make to the claim in equity—namely, that in the circumstances of the present case the company never had anything whatever to do with any of the transactions; it was a mere semblance of a company which neither could nor did take any action.

That fact is the reason why I find myself in respectful disagreement with the Master of the Rolls in regard to the appellant's claim in equity. It cannot, in my opinion, be said that the company used his money, when it did not (because it could not) take any action whatsoever in relation to the advances. Antrobus, the secretary of all three companies, no doubt received the cheques and sent them to the creditor concerned; but Cleadon Trust, Ld., itself did nothing at all. It never received the cheques, never handled them, never handed them to the subsidiaries, and never used the advances; in particular, it never decided to forestall its liabilities as guarantor. It did not do these things, because in the state of legal paralysis in which it was it had no mind, and could not do any one of these things, the legal reason being that they were all matters appertaining to the management of the company and requiring a decision of the board.

(1) (1799) 8 T. R. 308, 310.

(2) [1928] 1 K. B. 48, 60.

I wholly agree with Clauson L.J. that it is this feature which distinguishes the present case from *Bannatyne* v. *D. & C. MacIver* (1); *Reversion Fund and Insurance Co., Ld.* v. *Maison Cosway, Ld.* (2), and *B. Liggett (Liverpool), Ld.* v. *Barclays Bank, Ld.* (3) In each of those cases the party held liable had taken action—whether personally or by an authorized agent does not matter—to use the money advanced. In *Bannatyne's* case (1) the agent Hudson, who borrowed the money without authority (because contrary to express instructions), was acting within his authority as manager in paying the firm's debts with it. This fact was cardinal, because it meant that the firm itself took action and used the plaintiff's money for its own purposes, conscious, because of the knowledge it had through its agent, that it was the plaintiff's money. It was for that reason that the Court there thought it unconscionable for the firm which had so used the money not to repay it, and to that extent held that the lender had an equitable right to recover.

The Master of the Rolls in the judgment just delivered relies particularly on the formulation of the equity by Romer L.J. (1) in the third sentence of his judgment, which I will read again: "Where money is borrowed on behalf of a principal by an "agent, the lender believing that the agent has authority "though it turns out that his act has not been authorised, "or ratified, or adopted by the principal, then, although the "principal cannot be sued at law, yet in equity, to the extent "to which the money borrowed has in fact been applied in "paying legal debts and obligations of the principal, the "lender is entitled to stand in the same position as if the "money had originally been borrowed by the principal." In that sentence the learned Lord Justice was referring to the fact that Hudson, the manager, although forbidden to borrow, had general authority to pay the firm's debts, therefore he held that to the extent that he so paid debts the firm itself was using the advances obtained. That was a case of natural persons, not a company, and Romer L.J. himself on the same page drew attention to the possible materiality in such questions of the difference between a natural person and a company; and as an illustration of the difference referred to the case of a wife, under the old regime of husband and wife, borrowing money to pay for necessaries, to which my Lord has referred. If the wife had money of her husband's in her hands, she was entitled as of right to use it to pay for her necessaries, whether still to be or already purchased by her; and there can be no doubt that, when she so used borrowed money, it was her own act in fact and nobody else's. But if it was her act in fact, it was in law her husband's act, for in her hands it was his money, and, in using it to pay for the necessaries upon which he was legally bound to spend his money, she was acting as his agent. And be it noted that, in the case where Romer L.J. was giving judgment, the payment of the firm's debts by the manager Hudson was a payment on behalf of the firm with the firm's full authority. In the present case it is just that complete absence of action by the company in regard to any utilization of the appellant's advances that makes the analogy between it and *Bannatyne's* case (1) break down. It cannot be said that Cleadon Trust, Ld., used the appellant's advances—for it was paralysed. The next case cited by the Master of the Rolls, *Reversion Fund and Insurance Co., Ld.* v. *Maison Cosway, Ld.* (2) was similar to *Bannatyne* v. *D. & C. MacIver* (1) with one apparent and one real difference in the facts. The person from whom repayment was claimed was a company registered under the Companies Acts and not a natural person, but this was not a real difference, because the company had a managing director with full authority to pay the firm's debts, who did use the plaintiff's money to pay the company's debts. That is what I call the apparent difference. The real difference is that the lender knew that the managing director to whom he lent the money had no authority from the company; but, having regard to the fact that the company itself used the lender's money, the Court held that the plaintiff's equity nevertheless attached.

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(1) [1906] 1 K. B. 103, 109.

(2) [1913] 1 K. B. 364.

(3) [1928] 1 K. B. 48.

I regard these two decisions as the most important for the purpose of understanding the equity in question, and, therefore, have endeavoured to explain shortly just why I think them important. But the same feature was, I think, present in *B. Liggett (Liverpool), Ld.* v. *Barclays Bank, Ld.* (1) The "discharge" of the company's debts, to which Wright J. (as he then was) refers, must be taken to have been made under Liggett's authority to pay current debts when he had money of the firm's out of which to pay them. But we shall hear in a moment or two, from Clauson L.J., a very careful, though concise, analysis of all the relevant cases, and I agree with it so entirely, and with his comments and conclusions, that it is both unnecessary and undesirable for me to add any further reflections of my own.

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(1) [1906] 1 K. B. 103.

(2) [1913] 1 K. B. 364.

The separate question in regard to items 1 and 2 which I reserved at the outset for subsequent mention is whether the fact that Mr. Jackson did not relinquish his post of managing director till August 6, 1931, that is, after the date of advance No. 2, makes any difference to those two items. I have considered the transcript of the appellant's evidence carefully and cannot see that he gave any evidence which would justify any such conclusion. I may add that I agree with what Clauson L.J. says in his judgment about this point. Accordingly I say no more except that I am glad to think that this Court is not extending its help to a director who seems to me to have used the company's business as if he owned it, and to have disregarded very important statutory provisions for its proper management.

In the result I think that the judgment of Bennett J. was right and should be affirmed and that the appeal should be dismissed with costs.

CLAUSON L.J. This is an appeal from an order of Bennett J. refusing an application of Mr. Creighton for the reversal of a decision of the liquidator of the Cleadon Trust, Ld., in so far as he rejected a claim by the applicant to be allowed to rank as a creditor for the sum of 18,254*l.* 7*s.* 3*d.* According to the facts as found by the learned judge, the secretary of the company, wholly without authority, procured Creighton to provide this money and to pay it to persons who were entitled to the payment of the moneys from a subsidiary company: the company had given guarantees to the payees, and the effect of the provision of the money was that the debt so guaranteed was discharged, and, in consequence, at the date of the liquidation the guarantee has ceased to be operative.

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(1) [1928] 1 K. B. 48, 68.

It was argued for Mr. Creighton in the first place that the secretary's request must be treated in the circumstances as the request of the company, and that Mr. Creighton was accordingly entitled at the date of liquidation to rank as a creditor of the company for the sum in question as for money paid at the company's request. This argument was rejected by the learned judge for reasons which he stated. (1) I can see no flaw in his Lordship's reasoning and I am prepared on this point to adopt his judgment as my own.

It was argued for Mr. Creighton in the second place, and on the footing that there was no request by the company, that the law would imply a request and therefore an obligation to repay from the facts: first, that the payments made by Creighton were made by him in expectation of the repayment; secondly, the company in the circumstances knew of this fact and acquiesced in it; and, thirdly, the company derived substantial benefit from the payments. The learned judge's reasons for rejecting this argument are given. (2) Again I can find no flaw in his Lordship's reasoning and I am prepared on this point, as on the preceding point, to adopt his judgment as my own.

It was next argued that (*a*) a resolution of the directors passed on December 5, 1932, and (*b*) the presentation of certain accounts to the shareholders, had the effect of validating Mr. Creighton's claims. The learned judge rejected this argument for reasons which he stated. (3) I agree with the reasons he there states and I find it unnecessary to add anything to his judgment on this head. On this part of the

(1) [1938] Ch. 666.
(2) Ibid. 666, 667.
(3) Ibid. 667, 668.

case I would only add two observations. The first is this: It will be seen from the statement of facts (1) that the case was argued before Bennett J. on the footing that no cash was received by the company in respect of the sums for which Mr. Creighton sought to prove. In this Court it was suggested that one of the sums was provided by a cheque drawn on Creighton's banking account in favour of the company, endorsed by the secretary, and handed on to a party, who drew the money from Creighton's bank and with it paid the ultimate creditor. It was suggested that on these facts the company ought to have been treated as having received the sum in question and passed it on to a party who cashed the cheque. It was not, however, shown that the secretary had any authority either to act for the company in taking the cheque or to act for the company in endorsing it. It appears to me that the sum in question cannot be treated as having reached the company by reason merely of the company's name appearing as payee on the cheque. The learned judge was in my view right in treating the case as one in which no cash came to the company's hands in respect of the sums in question. The second observation is this: It appears that Mr. William Jackson was not only a director, but also, apparently until August 6, 1931, managing director. The first two of the items in respect of which Mr. Creighton claimed to prove were paid by him at a date falling within the period during which Mr. Jackson was managing director. Had there been evidence that Mr. Jackson was privy to the provision of these sums or to their application, a different complexion might have been put upon the matter, in view of the authorities which recognize a prima facie power in a managing director to bind the company. It was, however, not suggested in argument before this Court, nor does there appear to be any evidence, that Jackson took any part either in procuring the provision of these sums by Mr. Creighton or in the application of them. Accordingly, these items fall to be treated in precisely the same way as the items provided by Mr. Creighton at a period when there was no managing director.

(1) [1938] Ch. 664.

There remains, however, a further point which, whether or not it was argued below, was put forward in this Court as a ground for reversing the judgment of the learned judge. It was alleged that the payment of the money provided by Mr. Creighton, or at all events of the bulk of it, resulted either (*a*) in the company being relieved of a liability under their guarantee for a like amount, or (*b*) in an asset being preserved to the subsidiary company by means of the payment with the result that certain debentures of the subsidiary company held by the company came to be of a value greater, either by the amount of the sum so paid or at all events by a very substantial sum, than the value which they would have borne had the sum in question not been paid. It was said to be contrary to the principles of equity as administered in this Court that the company should be allowed to retain any such benefit except on the terms of reimbursing to Mr. Creighton the sum paid by him which had resulted in the company obtaining the benefit. It is to be borne in mind that upon the facts of this case there was no request by the company that the payment in question should be made, and that the payment was not made by any person who had authority from the company either to make the particular payment or generally to make payments, in respect of the company's liabilities, on the company's behalf, nor was it made out of moneys in the company's possession or under the company's control. The equity to be enforced against the company must accordingly, as it would seem, arise from the fact that strangers, out of moneys which are not the company's moneys, or treated by the company or any person having authority from the company as the company's moneys, have made payments which have benefited the company. The equity would accordingly appear to be founded on the mere fact that an unsought benefit has been conferred on the company. Since the decision in this Court in *Falcke* v. *Scottish Imperial Insurance Co.* (1), it is, I conceive, not open to this Court to hold that a person who by paying money confers an unsought benefit on another thereby entitles himself to an equitable right of recoupment as against that other. As Bowen L.J. said in that case: "The general principle "is, beyond all question, that work and labour done or money "expended by one man to preserve or benefit the property of "another do not according to English law create any lien "upon the property saved or benefited, nor, even if standing "alone, create any obligation to repay the expenditure. "Liabilities are not to be forced upon people behind their "backs any more than you can confer a benefit upon a man "against his will." Some earlier observations on this topic by Brett M.R. in *Leigh* v. *Dickeson* (1) are entirely in accord with the statement of the law by Bowen L.J. It was, however, argued that an equitable doctrine was to be deduced from certain reported cases to the effect, as I understood the argument, that a person who has in fact paid the debts of another without authority is entitled to recoupment as against that other. Such a doctrine would seem to be inconsistent with the decision of this Court in *Falcke* v. *Scottish Imperial Insurance Co.* (2), and on that ground alone it would not seem open to this Court to accept it: but it may nevertheless be desirable to consider whether the cases in question recognize any such doctrine. The earlier cases cited in support of the doctrine were *In re Cork and Youghal Ry. Co.* (3); *Reid* v. *Rigby & Co.* (4); *Bannatyne* v. *D. & C. MacIver* (5) and *Reversion Fund and Insurance Co.* v. *Maison Cosway, Ld.* (6) From those decisions a clear equitable principle is to be deduced which I will venture to state as follows: Let it be assumed that A requests B to advance money to C, A being a person who has no authority from C to make the request (whether because C is a company whose powers are limited in such a way as to make it ultra vires on C's part to make such a request, or whether because A, though professing to act as C's authorized agent to make the request, has in fact no such authority): let it be further assumed that B, in response to the request, in fact places the money under the control of C or C's agents, and C, or an agent authorized by C to pay off C's debt's uses the money or procures the money to be used in or towards discharge of C's debts. On these assumed facts a court of equity will treat B as entitled to be recouped by C a sum equal to the amount so used in or towards discharging C's debts.

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(1) 34 Ch. D. 234, 248.

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(1) (1884) 15 Q. B. D. 60, 65.
(2) 34 Ch. D. 234.
(3) L. R. 4 Ch. 748.
(4) [1894] 2 Q. B. 40.
(5) [1906] 1 K. B. 103.
(6) [1913] 1 K. B. 364.

In the case of *In re Cork and Youghal Ry. Co.* (1) the directors of the company occupied the position of A, the holders of the Lloyd's bonds occupied the position of B, the company occupied the position of C. The moneys advanced by the bondholders came under the control of the company C, and were applied by the directors in paying off the company's legitimate debts, it being within their authority as directors to pay off those debts. In *Reid* v. *Rigby & Co.* (2), Allport occupied the position of A, Reid occupied the position of B, Rigby & Co. occupied the position of C. The money was paid into the banking account of Rigby & Co. (C), and was applied by Allport as manager for Rigby & Co. in paying off Rigby & Co.'s debts, it being within his authority to pay off those debts. In *Bannatyne* v. *D. & C. MacIver* (3) Hudson occupied the position of A, Bannatyne occupied the position of B, the firm of MacIver occupied the position of C. The moneys advanced by Bannatyne were paid into MacIver's bank account, and were applied by Hudson in paying the legitimate debts of the branch of MacIver's of which he was the manager, it being within his authority as such manager to pay off those debts. In *Reversion Fund and Insurance Co.* v. *Maison Cosway, Ld.* (4), Morhange occupied the position of A, Reversion Fund occupied the position of B, Maison Cosway occupied the position of C. The moneys advanced by Reversion Fund were paid to Morhange and applied by him in paying legitimate debts of Maison Cosway, which it would be within his authority as managing director of Maison Cosway to pay.

It is to be observed that the equity cannot operate against C (the company or the principal) merely because C has in

(1) (1869) L. R. 4 Ch. 748.
(2) [1894] 2 Q. B. 40.
(3) [1906] 1 K. B. 103.
(4) [1913] 1 K. B. 364.

C. A.
1938
CLEADON TRUST, LD., *In re.*
Clauson L.J.

fact received a benefit from B's action in providing the money: that fact alone, as *Falcke's* case (1) has settled (so far as this Court is concerned), would not set up an equity against C. The equity must, it would seem, arise from the fact that C, by himself or by a person authorized to act, in the matter of payment of C's debts, for C, has used the money so as to obtain a benefit for C. The benefit has not been an unsought benefit conferred on C behind his back. It is a benefit which C has obtained for himself by using (either himself or by his agent) A's money as his own. It is his conduct in so using A's money which makes it unconscientious that he should retain the benefit while refusing recognition of A's just claim to recoupment. As Lord Sumner pointed out in *Sinclair* v. *Brougham* (2): "There is now no ground left for suggesting "as a recognisable 'equity' the right to recover money in "personam merely because it would be the right and fair "thing that it should be refunded to the payer." But there is no difficulty in recognizing and enforcing against a man who has, by himself or his agent, used another's money to pay his own debt, an equity to refund to that other a sum equal to the money of that other which he has treated as his own. In *Bannatyne* v. *D. & C. MacIver* (3) Romer L.J. refers to the cases in which a husband has been held liable in equity to recoup to a quasi-lender money applied in payment of necessaries for the wife. In *Jenner* v. *Morris* (4), which no doubt is one of the cases which Romer L.J. had in mind, the decision on the facts of the case seems to come within the principle as I have endeavoured to state it, since, as appears from the answer as stated in the report, the wife's brother had paid money to the wife for her maintenance and support, which moneys had been actually laid out in the purchase of necessaries for her. The wife was, of course, the husband's agent to apply his money in payment for her necessaries. The inquiry, which had been directed by Kindersley V.-C. and was upheld by Lord Campbell L.C., was directed to ascertaining what moneys the claimant had paid

(1) 34 Ch. D. 234.
(2) [1914] A. C. 398, 456.
(3) [1906] 1 K. B. 103, 110.
(4) 3 De G. F. & J. 45.

to or on account of the wife for the purpose of providing her with necessaries. It is true, no doubt, that in these cases the judges do not draw specific attention to the fact that in each case the money was expended in paying the quasi-borrower's debts by or with the privity of a person who had authority to use the quasi-borrower's money in paying the quasi-borrower's debts ; but as the facts in each case stood the limited principle which I have stated suffices to justify the decisions without infringing the principle recognized in *Falcke* v. *Scottish Imperial Insurance Co.* (1) Since the facts did not necessitate the consideration by the Courts of any wider principle, it does not seem to me, I confess, to be open to this Court to deduce a wider principle from those decisions, if (as I venture to think) the wider principle would, if established, infringe the principle recognized in *Falcke* v. *Scottish Imperial Insurance Co.* (1)

The next case cited in order of date is *A. L. Underwood, Ld.* v. *Bank of Liverpool and Martins.* (2) In that case Underwood (for all the purposes material to the matter now in question) occupied the position of A, the bank occupied the position of B, the plaintiffs Underwood, Ld., occupied the position of C. An inquiry into the facts was directed in order to ascertain whether money of Underwood, Ld., which had found its way into the hands of the bank (B) had been used to pay legitimate debts of Underwood, Ld. (C) ; and it was authoritatively suggested, though not perhaps finally decided, that the cases of *Bannatyne* v. *D. & C. MacIver* (3) and *Reid* v. *Rigby & Co.* (4) were authority for the view that the bank were to be treated in regard to those moneys as in the same position as if they had provided the money upon a request made by an unauthorized person on behalf of Underwood, Ld., and the money had been paid out in meeting legitimate debts of Underwood, Ld. That would, in my view, have been perfectly correct, on the principle which I have formulated above, if the debts were paid out of the money either by Underwood, Ld., or by some person authorized by Underwood, Ld., to pay them. As I read the report (1), the inquiry was directed on the assumption that it could be established that Underwood had authority as between himself and the company to pay those debts. If that be (as I venture to think it is) the right view of the decision, it would appear neither to contradict nor to go beyond the principle which I have formulated above as the principle to be deduced from the earlier cases. I venture to doubt whether Scrutton L.J., when he referred (1) to the "equitable doctrines under which a person who had in fact "paid the debts of another without authority was allowed "the advantage of his payments," intended to express his adoption of any principle beyond that which can be deduced from the cases which he cites, namely, *Bannatyne* v. *D. & C. MacIver* (2) and *Reid* v. *Rigby & Co.* (3) If the view I have indicated above of those two cases be correct, the matter would have been quite correctly stated if his Lordship had used the phrase " equitable doctrines under which a person "who had without authority provided money which in fact "was used, by a person having authority so to do, to pay the "debts of another was allowed the advantage of the payment." So stated the doctrine would have fully justified the form of inquiry ordered, which was directed to ascertaining the circumstances under which the debts were paid. It is not, I venture to think, a fair reading of the few relevant lines in his Lordship's judgment to treat them as intended to lay down any equitable principle which could not be deduced from the cases which he cites of *Bannatyne* v. *D. & C. MacIver* (2) and *Reid* v. *Rigby & Co.* (3)

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(1) 34 Ch. D. 234.
(2) [1924] 1 K. B. 775.
(3) [1906] 1 K. B. 103.
(4) [1894] 2 K. B. 40.

In the next case, *B. Liggett (Liverpool), Ld.* v. *Barclays Bank, Ld.* (4), Liggett occupied the position of A, and, without authority from B. Liggett, Ld., C, procured Barclays Bank, B, to provide money which was used by Liggett, who was carrying on the business and could not carry it on without paying the legitimate debts of Liggett, Ld., in due course of business, to pay those legitimate debts. If the view of the previous authorities which I have indicated above be correct, it follows that the bank were entitled to debit Liggett, Ld., with a sum equal to the amount of the legitimate debts of Liggett, Ld., so paid out of the money provided by the bank, provided only that it appeared that Liggett had authority as between himself and Liggett, Ld., to pay the debts. I should have thought that there was, on the facts, strong ground for holding that Liggett, Ld., though they could repudiate the cheques signed by Liggett, could not repudiate Liggett's authority to pay their legitimate debts, since he was conducting the business and the company received the goods so paid for, goods supplied for the purposes of the business, goods for the payment of which the company were held by the learned judge to be liable. (1) If then Liggett had authority to pay the company's debts, the principle as I have stated it above amply justified the result of the case, namely, the establishment of the liability of Liggett, Ld., to give the bank credit for sums paid on cheques drawn by Liggett for sums which in fact were used to pay the debts of Liggett, Ld. The case was the mere case of an obtaining by Liggett on the company's behalf but without authority of moneys which he within his authority as conductor of the business used to pay the company's legitimate debts. It must, however, be admitted that the learned judge seems to treat the case as one in which the difficulty was that Liggett had no authority to pay the company's debts, whereas in my view the difficulty arose not from any absence of authority in Liggett to pay the company's debts, it being in my view (and I venture to think also in the learned judge's view) his duty as conducting the business to pay them, but from the absence of authority in Liggett to procure the necessary funds on the company's behalf and so to impose on the company direct liability as a debtor.

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(1) [1924] 1 K. B. 775, 794.
(2) [1906] 1 K. B. 103.
(3) [1894] 2 K. B. 40.
(4) [1928] 1 K. B. 48.

With the greatest respect for Scrutton L.J. and for Wright J. I cannot persuade myself that this Court would be justified by anything in the reports of the two last mentioned cases in extending the principle as established in this Court in the earlier cases so as to cover not only a case where the money provided has been expended by the quasi-borrower or by an agent authorized by him to pay his legitimate debts, but also the case of the money being expended by an outsider with no authority direct or indirect to pay the quasi-borrower's debts. In *Lloyds Bank, Ld.* v. *Chartered Bank of India, Australia & China* (1) reference was made to *Bannatyne* v. *D. & C. MacIver* (2), but on the facts the question of the applicability of the principle recognized in that case did not arise and the content of the principle was not discussed. The case of *In re Airedale Co-operative Worsted Manufacturing Society, Ld.* (3) was referred to; but it was a simple case of the application by the authorized officers of the quasi-borrowing society of the money borrowed in discharging the legitimate debts of the society and it throws no light on the point in question in the present case.

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(1) [1928] 1 K. B. 48, 59.

In my judgment it results from a survey of the cases upon which the appellants sought to establish the equity on which they rely that no principle can be deduced from them which enables this Court to hold that the mere fact that Mr. Creighton made payments which enured to the benefit of the company established an equity in his favour against the company to have recoupment from their funds. In my opinion the appeal should accordingly fail and be dismissed with costs.

Appeal dismissed.

Solicitors: *T. D. Jones & Co.*; *Bentleys, Stokes & Lowless, for Criddle, Ord & Muckle, Newcastle-upon-Tyne.*

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(1) [1929] 1 K. B. 40, 63, 75, 79.
(2) [1906] 1 K. B. 103.
(3) [1933] Ch. 639.

F. H. C.

Distinguished. CANNON *v.* HARTLEY. [1949] 1 Ch. 213

In re KAY'S SETTLEMENT.

BROADBENT *v.* MACNAB.

[1938. K. 4914.]

(MANCHESTER DISTRICT REGISTRY.)

SIMONDS J.
1938
Dec. 8, 13.

Settlement—Voluntary Settlement—Covenant to settle after-acquired property—Refusal of settlor to implement covenant—Application by trustees for directions—Trustees directed not to take proceedings.

A voluntary settlement executed by a spinster contained a covenant in the usual form to settle any after-acquired property, with certain exceptions. The settlor afterwards married and had three children. Having become entitled under a will to a legacy and a share of residue which fell within the covenant, and a share in an appointed fund, she was asked by the trustees of the settlement to settle this property, but refused to do so:—

Held, on an application by the trustees for directions, that the children, being volunteers, had no right to enforce the covenant, and therefore the trustees ought to be directed not to take any proceedings to enforce the covenant, by action for damages for breach, or otherwise.

In re Pryce [1917] 1 Ch. 234 followed and applied.

SUMMONS.

By a voluntary settlement dated December 24, 1907, and made between Mary Winifred Kay, spinster (thereinafter called "the settlor"), of the one part, and Alfred Emmott, Charles Percy Lees, and Walter France-Hayhurst (thereinafter called "the trustees") of the other part, after reciting that the settlor was entitled to certain reversionary interests therein described and other assets and that it had been agreed that provision should be made for the settlement of other or future-acquired property of the settlor, except as therein mentioned, the settlor as settlor assigned to the trustees her reversionary interest and other assets therein mentioned unto the trustees upon trusts for sale and investment, and to pay the income of the investments for the time being, thereinafter called the trust fund, to the settlor during her life, with power to her to appoint that the whole or any part of the said income after her death should be paid to any husband whom she might leave during his life or for any less period; and after the death of the settlor and subject to any interest appointed to a husband, the trust fund and the income thereof were to be held in trust for all or any one or more of the issue of the settlor as she should by deed or will appoint, and in default of and subject to any such appointment in trust for all the children of the settlor who should attain twenty-one or die under that age leaving issue, or being daughters, should attain that age or marry in equal shares.

By clause 5 it was provided that notwithstanding anything therein contained the settlor should have full power by will to dispose of any part of the trust fund not exceeding 4000*l.*

By clause 12 it was agreed and declared that if the settlor should at any time during her life become seised possessed or entitled of or to any real or personal property from or through any relative in blood on her father's or mother's side (other than the property thereby specifically settled) for any estate or interest whatsoever in possession reversion remainder contingency or expectancy (except property of a less value than 500*l.*) vesting in possession during her life, except accumulations of income of the settlor, all such real and personal property should forthwith be assured or transferred by the settlor her heirs executors or administrators to the trustees to hold upon trusts for sale and conversion, and subject thereto upon the trusts subject to the powers and provisions declared by the settlement.

Walter France-Hayhurst died on September 24, 1912, and Alfred Emmott died on December 13, 1926, and by a deed of appointment dated June 7, 1927, the plaintiffs John Theodore Crofton Broadbent and Christopher Hamilton France-Hayhurst were appointed trustees of the settlement. Charles Percy Lees died on February 16, 1929.

The settlor was married once only, namely to Gordon Robert Macnab in 1913, and there were three children of the marriage, the defendants Mary Jocelyn Tilney, Helen Winifred Macnab, and Robert Christopher Gordon Macnab, an infant.

The settlor's mother, Mary Lees Kay, died on June 11, 1937, and her will dated September 10, 1936, together with a codicil thereto dated November 20, 1936, was duly proved on

October 5, 1937. Under that will the settlor became entitled to a pecuniary legacy of 1000*l.* and a share in the residuary estate of the testatrix. The settlor was also entitled, contingently upon her surviving the widow of her uncle, the late Edward Howard Moss, to a substantial share in his residuary estate.

The settlor was also entitled under her mother's marriage settlement, dated January 25, 1875, in default of appointment by her mother, to a share in a sum of £20,000. The mother, in exercise of her power of appointment, appointed a share of the fund to the settlor. It was conceded that, if the settlement operated as to this share, it operated by virtue of the implied covenant for furthur assurance.

The settlor informed the trustees that she did not consider she should have to bring the above mentioned items of property into settlement, and contended that, the settlement being purely voluntary, the trustees ought not to take any steps against her to compel performance by her of or sue for damages for her failure to implement the provisions of the after-acquired property clause contained in the settlement.

The trustees thereupon took out this summons asking that in the events which had happened direction might be given to them as trustees whether they should take proceedings against the settlor, who was made a defendant to the summons, (*a*) to compel the performance of her said covenant, or (*b*) to recover damages through her failure to implement the said covenant, or (*c*) such other proceedings as the Court should think fit, or whether they should abstain from taking any such proceedings, and generally what steps the trustees ought to take having regard to the said covenant and in the event which had happened. The settlor's three children were also made defendants to the summons.

The summons was amended to raise the question whether the appointed fund was caught by the covenant in the settlement.

Wilfrid M. Hunt for the plaintiffs, trustees of the settlement.

F. R. Evershed K.C. and *T. A. C. Burgess* for the defendant

SIMONDS J.
1938
KAY'S SETTLEMENT, *In re.*
BROADBENT *v.* MACNAB.

Mrs. Macnab, the settlor and tenant for life. There are two questions arising on this settlement (1.) whether having regard to the exercise by this defendant's mother of the power of appointment over her marriage settlement funds, this defendant's interest under such appointment is caught by the settlement and should be brought in, having regard to the covenants for title arising by her having assigned as "settlor," and (2.) whether this defendant is bound to settle any property to which she has or may become entitled under the after-acquired property clause (clause 12).

A settlement of an expectancy is wholly inoperative at law, but in equity it is treated as an enforceable contract, if given for valuable consideration: see Underhill on Trusts and Trustees, 8th ed., at pp. 46, 47. This being a voluntary assignment of an expectancy, there is no enforceable contract or trust: *Meek* v. *Kettlewell.* (1); *In re Ellenborough.* (2) The settlement assigns certain moneys actually vested in the settlor, and she is to that extent bound; otherwise as to expectancies it is void as an assignment, and ineffectual as a declaration of trust.

Therefore so far as clause 1 is concerned the assignment of the expectancy is not enforceable.

If the after-acquired property clause (clause 12) refers to property other than that mentioned in clause 1, as we contend it does not, then the second point arises, whether the trustees can, and ought to, take any steps to enforce it. A covenant to make a settlement of future property, whenever acquired, cannot be enforced by volunteers claiming under it: *In re D'Angibau.* (3) That was a case of a husband claiming as administrator of his wife against her next of kin, who claimed the property under a contract to settle it contained in her marriage settlement, and it was held that the next of kin, being volunteers, were not entitled to enforce the covenant. The children of Mrs. Macnab are in a similar position under this settlement. The trustees for volunteers are under no greater duty to take proceedings to enforce such an agreement than the volunteers themselves.

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(1) (1842) 1 Hare, 464, 476; (1843) 1 Phill. 342.

(2) [1903] 1 Ch. 697.

(3) (1880) 15 Ch. D. 228.

In two cases this Court has held that trustees for volunteers ought not to sue to enforce such a covenant. It is well established that no action for specific performance will lie, but it has been suggested that trustees could sue at common law for damages for breach of covenant. These cases, *In re Plumptre's Marriage Settlement* (1) and *In re Pryce* (2), decide that they cannot do so. Any such action is bound to fail, and therefore the Court will not direct them to bring it. Only persons within the marriage consideration are entitled to enforce such a covenant: *Pullan* v. *Koe.* (3)

It is submitted that the present case is entirely covered by the decision in *In re Pryce* (2), where the facts were very similar, and which has been followed in two unreported cases. There is a decision of Younger J. in *In re Cavendish Browne's Settlement Trusts* (4) which at first sight appears to conflict with these cases, but it is only very shortly reported in the Weekly Notes, and concerned a covenant to settle property actually vested in the settlor and not merely an expectation.

E. M. Winterbotham for the children of Mrs. Macnab. This is not merely an executory agreement for a settlement, but a completed declaration of trust in favour of the children. There are cases where, if there is merely a contract between A and B under which C benefits, C cannot sue upon it, but this is not one of them: cf. *Gandy* v. *Gandy.* (5)

Here the trustees are trustees of the covenant to settle after-acquired property, and of the covenant for further assurance implied by the words " as settlor." Though neither covenant can be specifically enforced, I contend that the trustees can and ought to sue for damages for breach of the covenants for the benefit of the children.

The decision in *Meek* v. *Kettlewell* (6) was merely that the Court would not decree specific performance of an implied undertaking to settle a future interest. But damages can be recovered for breach of a covenant which could not be specifically enforced, and as regards any property in expectancy coming under clause 1 the settlor is liable under her implied covenant. Earlier cases such as *Cox* v. *Barnard* (1) and *Patch* v. *Shore* (2) before the Judicature Act, 1873, show that the Courts of Equity treated a voluntary covenant as giving rise to a claim for damages on breach, though they would not enforce the covenant specifically. At common law any covenant under seal can be enforced though no consideration may pass. See also *Fletcher* v. *Fletcher* (3); *Williamson* v. *Codrington.* (4) In the latter case Lord Hardwicke L.C. admitted in an administration action a claim to damages for breach of a voluntary covenant to warrant the title to land, slaves, etc., and refused to send the case to a Court of law "to make "two suits out of one." The grounds on which Equity refused specific performance are set out in the notes to *Ellison* v. *Ellison* (5) in White and Tudor's Leading Cases (6), referring to *Fortescue* v. *Barnett.* (7) The decision in *In re Pryce* (8) appears to have been based by the learned judge upon some supposed alteration of the law made by s. 24, sub-s. 2, of the Judicature Act, 1873, now re-enacted as s. 38 of the Supreme Court of Judicature (Consolidation) Act, 1925, entitling a defendant to rely on any equitable defence he may set up in any Court. But, before the Act, no action on a covenant to recover money could have been brought in the Court of Chancery. The section does not mean that if a plaintiff brings an action at law on a covenant he can be met by the defence that he is a volunteer. See *Powell* v. *Brodhurst* (9) and *In re Lucan* (*Earl of*) (10), where a voluntary creditor was allowed to prove with other creditors in the administration of an insolvent estate.

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(1) [1910] 1 Ch. 609.
(2) [1917] 1 Ch. 234.
(3) [1913] 1 Ch. 9.
(4) [1916] W. N. 341; 61 Sol. Jo. 27.
(5) (1885) 30 Ch. D. 57, 66.
(6) 1 Hare, 464.

In re Cavendish Browne's Settlement Trusts (11) is the only case of a voluntary covenant, where the question of suing for damages was raised, and that was decided in favour of the volunteer.

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(1) (1850) 8 Hare, 310.
(2) (1862) 2 Dr. & Sm. 589.
(3) (1844) 4 Hare, 67.
(4) (1750) 1 Ves. Sen. 511.
(5) (1802) 6 Ves. 656.
(6) 9th ed., vol. 2, 782, 793 et seq.
(7) (1834) 3 My. & K. 36.
(8) [1917] 1 Ch. 234.
(9) [1901] 2 Ch. 160, 164.
(10) (1890) 45 Ch. D. 470.
(11) [1916] W. N. 341; 61 Sol. Jo. 27.

The only point decided in *In re D'Angibau* (1) was that a volunteer could not get specific performance of a covenant to transfer property. *In re Plumptre's Settlement* (2) also started merely with the question whether the covenant could be specifically enforced, but Mr. Clayton in his argument claimed that he could recover damages. It was held that the claim to damages was barred by the Statutes of Limitation. It is really an authority in favour of my contention so far as it goes.

In *In re Pryce* (3) the only question put to the judge was whether the trustees were bound to take steps specifically to enforce the covenant, and there was no party beneficially interested before the Court to argue the present point. The learned judge said (4): "Nor would damages be awarded either in "this Court, or, I apprehend, at law, where since the Judicature "Act the same defences would be available to the defendant as "would be raised in an action brought in this Court for specific "performance or damages." I submit that this passage contains a misapprehension of the true effect of the Judicature Act, 1873, s. 24. It is, moreover, rather difficult to see what Eve J. really did decide. As he sums it up in the last sentence of his judgment, it was only that the trustees were not to take proceedings for specific performance, though it certainly looks as if he thought that, if the trustees sued for damages for breach of covenant, they would fail.

It is submitted that on that point the decision is inconsistent with *Fletcher* v. *Fletcher* (5) and other cases. The distinction taken on behalf of the settlor between *Fletcher* v. *Fletcher* (5) and *In re Pryce* (3) is not a sound one. The real distinction is shown by *Colyear* v. *Countess of Mulgrave* (6)—namely, that, where two persons enter into covenants with each other which if performed happen to benefit a stranger, the stranger cannot enforce the covenant. And see *In re Flavell.* (7)

[SIMONDS J. That is a case where a widow of a partner was provided for in a partnership deed, which comes into a category of its own.]

(1) 15 Ch. D. 228.
(2) [1910] 1 Ch. 609.
(3) [1917] 1 Ch. 234.
(4) Ibid. 241.
(5) 4 Hare, 67.
(6) (1836) 2 Keen, 81, 98.
(7) (1883) 25 Ch. D. 89.

SIMONDS J.
1938
KAY'S SETTLEMENT, *In re.*
BROADBENT *v.* MACNAB.

The decision comes under the general principle stated in *Gandy* v. *Gandy*. (1) The doctrine that a third party cannot enforce a contract cannot be used to prevent a trustee suing under a covenant entered into for the benefit of his cestuis que trust. All these covenants are part of the trust property, and that being so the trustee is bound to enforce them for the benefit of his cestuis que trustent, whether volunteers or not.

Assuming, however, that an action is brought on this covenant and fails, nevertheless the children are entitled to compensation out of the settlor's interest in the property already settled.

[SIMONDS J. That point is not raised, and I do not propose to decide it.]

No reply was called for.

1938. Dec. 13. SIMONDS J. In this case the trustees of a voluntary settlement made on December 24, 1907, by a woman, then Mary Winifred Kay, spinster, ask whether they should take any and what proceedings to compel the performance by her of a covenant contained in that settlement or to recover damages for her failure to implement the covenant. A further question is raised with regard to a covenant of further assurance in respect of certain property which I shall have to mention more specifically.

The circumstances are these. On December 24, 1907, the settlor made her settlement, the trustees to it being Emmott, Lees, and Hayhurst. The settlement recited that, under the will of Elkanah Moss, the settlor was entitled, subject to the life interest of her mother, Mary Lees Kay, to an equal share, with other children of Mary Lees Kay, in a sum of 20,000*l.* or the investments for the time being representing the same. It recited that under an indenture of January 25, 1875, made between Christopher Kay, her father, of the first part, her mother, Mary Lees Kay, of the second part, and the trustees of the third part, and under a further indenture therein referred to, the settlor was or might become entitled, subject to the life interest of her

(1) 30 Ch. D. 57.

mother, to a share of and in a further sum of 20,000*l.* therein specifically mentioned. It recited, too, that the settlor was possessed of or entitled to the sum of 16,500*l.* which she had arranged to advance temporarily to her brother in circumstances therein stated. It recited that the settlor was desirous of settling the reversionary share or shares of and in the two several sums of 20,000*l.* to which she was or might become entitled, and also her undivided moiety of a certain mortgage for 33,000*l.* It recited that it had been agreed that such provision should be made for the settlement of other or future-acquired property of the settlor except as was thereinafter mentioned. And it contained the usual recital as to the making of a voluntary settlement and a reservation of the power to revoke.

The operative part of the settlement is as follows: "The "said Mary Winifred Kay as settlor hereby assigns unto the "trustees All that one equal fourth part or share or other the "part or share to which the said Mary Winifred Kay is entitled "in the said sum of 20,000*l.* or the investments for the time "being representing the same under or by virtue of the said "in part recited will of the said Elkanah Moss deceased "And also all that the part or share to which the said Mary "Winifred Kay is or may become entitled in the said further "sum of 20,000*l.* under or by virtue of the said indentures of "the 25th and 26th days of January 1875 or either of them or "under any appointment which may be made thereunder in "her favour by the said Mary Lees Kay and all other (if any) "the part or share parts or shares to which she may hereafter "become entitled by accruer survivorship or otherwise of and "in the said two several sums of 20,000*l.*"

Let me pause here to observe this. The assignment purported to be an assignment of (inter alia) the share to which she was or might become entitled in the second mentioned sum of 20,000*l.* In the events which happened, though at the time of the settlement she was entitled to a share, that share was liable to be defeated by the exercise by her mother of the power of appointment, and in fact her mother did exercise the power and appoint to her a certain share. So that so far as that appointed share was concerned this part of the settlement operated as a covenant by way of further assurance to assign the share which was in fact appointed to her.

Then by clause 12 of the settlement the settlor entered into the usual after-acquired property clause. It was thereby agreed and declared that if the settlor should "at any time "during her life become seised possessed or entitled of "or to any real or personal property from or through any "relative in blood on the father or mother's side but not "otherwise (other than the property hereby specifically "settled) for any estate or interest whatsoever in possession "reversion remainder contingency or expectancy . . . . then "and so often as the same shall happen all such real and "personal property (except as aforesaid) shall forthwith at "the expense of the trust estate be assured or transferred by" the settlor, her heirs, executors or administrators, to the trustees, to be held on the trusts of the settlement.

That settlement having been made on December 24, 1907, the settlor subsequently married one Macnab, and by him she has had issue of the marriage three children and no more. Her mother died on June 11, 1937, and, as I have said, she exercised her power of appointment in favour of the settlor in respect of part of the 20,000*l.* fund first mentioned. Under her will also the settlor became entitled to a substantial pecuniary legacy and to a share of residue, and it appears that the settlor is also entitled, contingent on her surviving a certain person, to a share in the residuary estate of an uncle, one Edward Howard Moss.

It is in these circumstances that the trustees have issued this summons, making as parties to it, first, the settlor herself and, secondly, her infant children, who are beneficiaries under the settlement. But, be it observed, though beneficiaries, her children are, for the purpose of this settlement, to be regarded as volunteers, there being no marriage consideration, which would have entitled them to sue, though they are parties to this application. The trustees ask whether, in the event which has happened of the settlor having become entitled to certain property, they should take proceedings against her to compel

SIMONDS J.

1938

KAY'S SETTLEMENT, *In re.* BROADBENT *v.* MACNAB.

performance of the covenant or to recover damages on her failure to implement it.

I am bound to say that that does not seem to me to be a very happy form of proceeding, though perhaps it is difficult to see how else the trustees should act. It is to be observed that one of the persons made a party is the very person as to whom the trustees ask the question whether she should be sued. She, the settlor, has appeared by Mr. Evershed and has contended, as she was entitled to contend, that the only question before the Court was whether the trustees ought to be directed to take such proceedings; that is to say, she contended that the only question before the Court was precisely that question which Eve J. had to deal with in *In re Pryce.* (1) She has said that the question before me is not primarily whether, if she were sued, such an action would succeed (as to which she might have a defence, I know not what), but whether, in the circumstances as they are stated to the Court, the trustees ought to be directed to take proceedings against her.

As to that, the argument before me has been, on behalf of the children of the marriage, beneficiaries under the settlement, that, although it is conceded that the trustees could not successfully take proceedings for specific performance of the agreements contained in the settlement, yet they could successfully, and ought to be directed to, take proceedings at law to recover damages for the non-observance of the agreements contained in the settlement, first, the covenant for further assurance of the appointed share of the first-mentioned 20,000*l.* and, secondly, the covenant with regard to after-acquired property. In the circumstances I must say that I felt considerable sympathy for the argument which was put before me by Mr. Winterbotham on behalf of the children, that there was, at any rate, on the evidence before the Court to-day, no reason why the trustees should not be directed to take proceedings to recover what damages might be recoverable at law for breach of the agreements entered into by the settlor in her settlement. But on a consideration of *In re Pryce* (1) it seemed to me that so far as this Court was concerned the matter was concluded and

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(1) [1917] 1 Ch. 234.

SIMONDS J.
1938
Kay's Settlement, *In re.*
Broadbent *v.* Macnab.

that I ought not to give any directions to the trustees to take the suggested proceedings.

In *In re Pryce* (1) the circumstances appear to me to have been in no wise different from those which obtain in the case which I have to consider. In that case there was a marriage settlement made in 1887. It contained a covenant to settle the wife's after-acquired property. In 1904 there was a deed of gift under which certain interests in reversion belonging to the husband were assured by him absolutely to his wife. The husband was also entitled to a one-third share in certain sums appointed to him by the will of his father in exercise of a special power of appointment contained in a deed of family arrangement. The share of the 9000*l.* fell into possession in 1891 on the death of his father, and was paid to him, unknown to the trustees of his marriage settlement, and spent. The interests given by the husband to the wife and his share of the 4700*l.* came into possession in 1916 on the death of the husband's mother, and were outstanding in the trustees of his parent's settlement and of the deed of family arrangement respectively. The husband died in 1907, and there was no issue of the marriage. Subject to his widow's life interest in both funds, the ultimate residue of the wife's fund was held in trust for her statutory next of kin, and the husband's fund was held in trust for him absolutely. The widow was also tenant for life under her husband's will. The trustees of the marriage settlement in that case took out a summons "to have it determined "whether these interests and funds were caught by the provisions of the settlement, and, if so, whether they should "take proceedings to enforce them." In those proceedings, apparently, the plaintiffs were the trustees of the marriage settlement, and the only defendant appears to have been the widow of the settlor; that is to say, there were no other parties to the proceedings to whose beneficial interest it was to argue in favour of the enforceability and enforcement of the covenant, but the trustees no doubt argued in favour of their interests, as it was their duty to do.

Eve J., in a considered judgment, held that although the

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(1) [1917] 1 Ch. 234.

SIMONDS J.

1938

KAY'S SETTLEMENT, *In re.*
BROADBENT *v.* MACNAB.

interests to which I have referred were caught by the covenant of the wife and the agreement by the husband respectively, yet the trustees ought not to take any steps to recover any of them. In the case of the wife's fund he said that her next of kin were volunteers, who could neither maintain an action to enforce the covenant nor for damages for breach of it, and that the Court would not give them by indirect means what they could not obtain by direct procedure; therefore he declined to direct the trustees to take proceedings either to have the covenant specifically enforced or to recover damages at law. The learned judge, as I have said, took time to consider his judgment. Many of the cases which have been cited to me, though not all of them apparently, were cited to him, and after deciding that no steps should be taken to enforce specific performance of the covenant he used these words (1): "The position of the wife's fund is somewhat different, in that "her next of kin would be entitled to it on her death; but "they are volunteers, and although the Court would probably "compel fulfilment of the contract to settle at the instance of "any persons within the marriage consideration—see per "Cotton L.J. in *In re D'Angibau* (2)—and in their favour will "treat the outstanding property as subjected to an enforceable "trust—*Pullan* v. *Koe* (3)—' volunteers have no right whatever "' to obtain specific performance of a mere covenant which has "' remained as a covenant and has never been performed': "see per James L.J. in *In re D'Angibau.* (2) Nor could damages "be awarded either in this Court, or, I apprehend, at law, where, "since the Judicature Act, 1873, the same defences would be "available to the defendant as would be raised in an action "brought in this Court for specific performance or damages."

That is the exact point which has been urged on me with great insistence by Mr. Winterbotham. Whatever sympathy I might feel for his argument, I am not justified in departing in any way from this decision, which is now twenty-one years old. The learned judge went on: " In these circumstances, "seeing that the next of kin could neither maintain an action

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(1) [1917] 1 Ch. 241.
(2) 15 Ch. D. 228, 242, 246.
(3) [1913] 1 Ch. 9.

"to enforce the covenant nor for damages for breach of it, and "that the settlement is not a declaration of trust constituting "the relationship of trustee and cestui que trust between the "defendant and the next of kin, in which case effect could be "given to the trusts even in favour of volunteers, but is a mere "voluntary contract to create a trust, ought the Court now for "the sole benefit of these volunteers to direct the trustees "to take proceedings to enforce the defendant's covenant? "I think it ought not; to do so would be to give the next of "kin by indirect means relief they cannot obtain by any direct "procedure, and would in effect be enforcing the settlement "as against the defendant's legal right to payment and "transfer from the trustees of the parents' marriage settlement." It is true that in those last words the learned judge does not specifically refer to an action for damages, but it is clear that he has in his mind directions both with regard to an action for specific performance and an action to recover damages at law—or, now, in this Court.

In those circumstances it appears to me that I must follow the learned judge's decision and I must direct the trustees not to take any steps either to compel performance of the covenant or to recover damages through her failure to implement it. I have been dealing so far expressly with the covenant for the settlement of after-acquired property. Exactly the same considerations arise with regard to the appointed sum under the parents' marriage settlement, for there it is conceded that the settlement, if it operated at all, operated by virtue of the implied covenant for further assurance and, since it rests in covenant, it stands on exactly the same footing as the property which would be caught by the covenant for settlement of after-acquired property. Accordingly, the summons being amended, I will answer that question specifically in that way. I direct that the trustees are not to take any steps or proceedings. The costs of all parties will be paid as between solicitor and client out of the capital of the settled fund.

Solicitors: *Skelton & Co., Manchester, for all parties.*

H. L. L.

Applied. *Re* BRASSEY'S DEED TRUSTS. [1951] 2 All E.R. 353.

In re HODSON'S SETTLEMENT.

C. A.

1938

Nov. 7, 9, 10, 16, 17, 18.

1939

Jan. 20.

BROOKES *v.* ATTORNEY-GENERAL.

[1937. H. No. 3424.]

Revenue—Estate duty—Settled property—Accumulations fund—Fund passing on death of settlor—Aggregation—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 1 ; *s.* 2, *sub-s.* 1 (*b*) *and* (*d*) ; *s.* 4.

By a deed dated May 20, 1925, H. appointed himself and B. trustees of a fund consisting of 20,000 1*l.* fully paid ordinary shares in W. B. & Co., Ld. This was styled the trust fund, whereout a clear sum of 1200*l.* was to be paid to G. S. every year during her life, and any residue was to be accumulated during the joint lives of H. and G. S. to form an accumulations fund. Any deficiency in the trust fund was to be made up from the capital or income of the accumulations fund. After the death of H. the income of the accumulations fund was to be paid to G. S. for her life, and there were trusts for her issue after her death, but the surplus income of the trust fund during the rest of the life of G. S. remained undisposed of, an omission which was remedied by a further settlement dated December 7, 1931. The settlor, H., died and the questions arose (1.) whether estate duty was payable on the accumulations fund under the Finance Act, 1894, s. 1; s. 2, sub-s. 1 (*b*); or s. 2, sub-s. 1 (*d*) (1); and (2.) whether the accumulations fund was an interest which should be aggregated under s. 4 of the Act with the other property of H. :—

Held, (1.) that the accumulations fund passed on the death of the settlor and estate duty was therefore payable under s. 1.

Decision of the Court of Appeal in *Attorney-General* v. *Lloyds Bank, Ld.* (1934) 151 L. T. 268 not followed.

Adamson v. *Attorney-General* [1933] A. C. 257 as explained in *Attorney-General* v. *Lloyds Bank, Ld.* [1935] A. C. 382, 397 and *Scott* v. *Inland Revenue Commissioners* [1935] Ch. 246, 265; [1937] A. C. 174 distinguished.

(2.) that the accumulations fund ought to be aggregated so as to form one estate with the other property which passed on H.'s death.

Attorney-General v. *Dickinson and Baron* [1937] 2 K. B. 574 approved.

Decision of Farwell J. [1938] Ch. 916 reversed.

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(1) Finance Act, 1894, s. 1, provides: "In the case of every "person dying after the com"mencement of this Part of this "Act, there shall, save as herein"after expressly provided, be "levied and paid, upon the princi"pal value ascertained as herein"after provided of all property, "real or personal, settled or not "settled, which passes on the "death of such person a duty,

C. A.
1938
HODSON'S SETTLEMENT, *In re.*
BROOKES *v.* ATTORNEY-GENERAL.

APPEAL from the decision of Farwell J. (1)

The following statement of the facts is taken from the judgment of Farwell J.:—

Prior to May 20, 1925, Laurence William Hodson was absolutely entitled to 20,000 1*l.* fully paid ordinary shares in a company known as W. Butler & Company, Ld. He transferred those shares into the names of himself and another as trustees to be held by them upon the trusts declared by a settlement of May 20, 1925. That settlement was made between the settlor and Thomas Cannon Brookes, and provided that the trustees should stand possessed of the 20,000 1*l.* fully paid ordinary shares in W. Butler & Company, Ld., and the investments for the time being representing the same which were defined as "the trust fund," upon the following trusts, that is to say, the trustees were out of the income of the trust fund if and so far as sufficient for the purpose to pay such a sum in every year as after the deduction of income tax for the time being in respect thereof would leave a clear sum of 1200*l.*, such sum to be paid to Grace Stuart therein mentioned during her life subject to forfeiture as therein mentioned. Secondly, that during the joint lives of the settlor and the said Grace Stuart the residue of the income should be accumulated by investing the same and the resulting income thereof and the trustees should stand possessed of such investments and the investments for the time being representing the same which

"called 'Estate duty,' at the "graduated rates hereinafter men- "tioned. . . . ."

Sect. 2, sub-s. 1, provides that: "Property passing on the death of "the deceased shall be deemed "to include the property follow- "ing, that is to say:—(*a*) Pro- "perty of which the deceased "was at the time of his death com- "petent to dispose; (*b*) Property "in which the deceased or any "other person had an interest "ceasing on the death of the "deceased, to the extent to which "a benefit accrues or arises by the "cesser of such interest; but "exclusive of property the interest "in which of the deceased or other "person was only an interest as "holder of an office, or recipient "of the benefits of a charity, or "as a corporation sole.

. . . .

"(*d*) Any annuity or other inter- "est purchased or provided by the "deceased, either by himself alone "or in concert or by arrangement "with any other person, to the "extent of the beneficial interest "accruing or arising by survivor- "ship or otherwise on the death "of the deceased."

(1) [1938] Ch. 916.

were called "the accumulations fund" and the annual income thereof upon the following trust: "If and whenever during "the life of the said Grace Stuart the annual income of the "trust fund shall be insufficient to provide such a sum as "after the deduction of the income tax for the time being "payable in respect thereof will leave a clear sum of 1200*l.* "the trustees shall make good such deficiency out of the "capital or income of the accumulations funds as they may "think fit." Then it was provided that after the death of the settlor, if the said Grace Stuart should survive him, subject to the immediately preceding trust and forfeiture the trustees were to pay the annual income of the accumulations fund to Grace Stuart during the residue of her life, and: "After "the death of the said Grace Stuart the trustees shall hold the "capital and income of the trust fund and of the accumulations "fund or so much thereof respectively as shall not have been "paid or applied under any trust or power affecting the "same: (1.) In trust for all or such one or more exclusively "of the others or other of the issue of the said Grace Stuart "whether children or remoter issue at such time and if more "than one in such shares and with such gifts over and such "provisions for maintenance advancement and otherwise at "the discretion of any person or persons and generally in "such manner for the benefit of such issue or some or one of "them as the said Grace Stuart shall by deed revocable or "irrevocable or by will or codicil appoint." Then: "And in "default of and until and subject to any such appointment in "trust for all or any the children or child of the said Grace "Stuart who attain the age of twenty-one years or being female "marry under that age and if more than one as tenants in "common in equal shares," subject to the provisions with regard to hotchpot therein contained.

There was no disposition by this settlement of the surplus income of the trust fund itself after the annual payment had been made to Grace Stuart, and, in order to fill up that omission, there was a supplementary settlement dated December 7, 1931, made between the settlor of the first part and the trustees of the second part, which provided (inter alia) that the trustees should stand possessed of the residue of the annual income of the trust fund during the life of the said Grace Stuart after the death of the settlor on trust to pay the annual income to the trustee Mr. Brookes absolutely.

The settlor died on March 3, 1933. At his death the fund still consisted of the 20,000 ordinary shares in W. Butler & Company, Ld. The first question in the summons, which was dealt with separately by Farwell J. and argued separately in the Court of Appeal, was: " Whether upon the true "construction of the said settlement and of the Finance Act, "1894, and Amending Acts, and in the events which have "happened, the estate duty payable upon the death of the said "Laurence William Hodson (hereinafter called ' the deceased ') "in respect of the accumulations fund in the said settlement "defined is payable under s. 1 of the Finance Act, 1894, "on the principal value of the said accumulations fund at the "death of the deceased, or under s. 2, sub-s. 1 (*d*), of the "said Act on the amount of the difference between the value "of the interest of Grace Stuart in the said accumulations "fund under the said settlement immediately after the death "of the deceased and the value of her interest in the said "accumulations fund under the said settlement immediately "before the death of the deceased."

Farwell J. held that the decision of the Court of Appeal in *Attorney-General* v. *Lloyds Bank, Ld.* (1), established that the existence of a life interest in the accumulated fund was not enough to take the case out of the decision in *Adamson* v. *Attorney-General* (2) and that that decision of the Court of Appeal had not been overruled in the House of Lords (2) and was one which he must treat as a binding decision. He must accordingly decide that the accumulations as a whole did not pass on the death of the settlor so as to make estate duty payable under s. 1 of the Finance Act, 1894, but were property deemed to pass within s. 2, sub-s. 1 (*d*), so as to be liable to duty under that provision.

The Crown appealed. The appeal on this point was argued on November 7, 9 and 10, 1938.

(1) (1934) 151 L. T. 268; [1935] A. C. 382.

(2) [1933] A. C. 257.

J. H. Stamp for the appellant. The accumulations fund passed on the death of the settlor so as to attract estate duty under s. 1 of the Finance Act, 1894, and Farwell J. was wrong in holding it was only property deemed to pass under s. 2, sub-s. 1 (*d*). The test whether property passes on the death depends on whether there has been a change in the possession of or title to the property as a whole. Here the person who became tenant for life of the accumulations fund on the death of the settlor had substantially no interest in the fund before then. The mere fact that the person taking on the death had a small interest before then is not enough to prevent the property passing: *Earl Cowley* v. *Inland Revenue Commissioners* (1), and see also *Attorney-General* v. *Milne.* (2) Thus the existence of a jointure does not prevent property passing as a whole. *Adamson* v. *Attorney-General* (3) differs from this case in that after the death the accumulations fund goes in the present case to a tenant for life and only on her death to remaindermen. In *Adamson's* case (3) the only person to take after the death had an immediate interest as from the date of the settlement, and it was for that reason that that property was held not to pass on the death of the settlor. Here a new interest arises on the death of the settlor—namely, that of the tenant for life. In *Attorney-General* v. *Lloyds Bank, Ld.* (4), there was a trust for accumulation and a trust of that fund after the settlor's death for his children in equal shares with a direction that the shares were not to vest in the children but to be held on trust for them and their children. When the settlor died, there were no grandchildren in existence, and until the case reached the House of Lords it was not appreciated that the rule in *Lassence* v. *Tierney* (5) applied so that the settlor's children took absolute interests defeasible on the birth of grandchildren. This brought the case directly within *Adamson* v. *Attorney-General* (3), as the possibility of a defeasance was treated as insufficient to distinguish it, and it was on that ground only

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(1) [1899] A. C. 198.
(2) [1914] A. C. 765.
(3) [1933] A. C. 257.
(4) [1935] A. C. 382.
(5) (1849) 1 Mac. & G. 551.

C. A.
1938
HODSON'S SETTLEMENT, *In re.*
BROOKES *v.* ATTORNEY-GENERAL.

that the decision of the Court of Appeal applying *Adamson* v. *Attorney-General* (1) was approved. In the House of Lords the ratio decidendi of the Court of Appeal applying *Adamson's* case (1) to a case like the present was not approved, and Lord Tomlin criticized the judges of the Court of Appeal for applying *Adamson's* case (1) on the view taken by them of the facts.

Here the accumulations fund passed to Grace Stuart for a life interest on the settlor's death, for before then her only interest apart from the annuity of 1200*l.* which continued after the settlor's death was to have that annuity made up out of the income of accumulations if in any year the income of the settled fund was insufficient. As the life interest arose on the death of settlor, the property clearly passed on his death. *Burrell & Kinnaird* v. *Attorney-General* (2) assists the appellant here. In *Adamson's* case (1) the question whether the accumulations stood on the same footing as the settled fund was kept open up to the House of Lords, and the judgments there seem to have proceeded on the footing that there was no difference between the two. Here the property in the accumulations was vested in the children of Grace Stuart subject to her power to appoint to children or remoter issue, but on the settlor's death the property as a whole was taken out of them to give effect to the life interest she then became entitled to. The accumulations fund therefore passed as a whole on the settlor's death, with the result that the duty became payable under s. 1 of the Act.

[He also referred to *De Trafford* v. *Attorney-General.* (3)]

Cyril Radcliffe K.C. and *B. F. Mendel* for the respondent. The argument for the appellant is identical with that rejected by the Court of Appeal in *Attorney-General* v. *Lloyds Bank, Ld.* (4), and that decision is binding on this Court. In the House of Lords (5) a different view was taken of the facts, but it is nowhere stated that the Court of Appeal's decision on the facts, as they regarded them, was wrong. Further it is not correct to say that as a result of the rule in *Lassence* v. *Tierney* (1) the children of the settlor took absolute interests. The true view is that the children had life interests with an ultimate possible absolute interest subject to a defeasance. Therefore it is impossible to treat the decision of the Court of Appeal in *Attorney-General* v. *Lloyds Bank, Ld.* (2), as mere dictum and as resting on hypothetical grounds.

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(1) [1933] A. C. 257.
(2) [1937] A. C. 286.
(3) [1935] A. C. 280.
(4) 151 L. T. 268.
(5) [1935] A. C. 382.

But, in case this Court should not consider itself bound by that authority, it is necessary to deal with the question in issue here on the merits. The property which the Crown say passed on the death of the settlor under s. 1 of the Act is a fund represented by certain investments at the settlor's death; but the accumulations fund was formed by an accumulation of income since the date of the settlement so that the property did not exist at that date. By creating the trust to accumulate no beneficial interests were created, and the only beneficial interests imposed on the fund were a contingent life interest in favour of Grace Stuart and interests in remainder in favour of her children on attaining twenty-one or marrying, subject to her power of appointment in favour of children or issue. Those interests were created by the settlement and existed from that date. Those were the interests in the block of investments the day before the settlor's death, and the only change on his death was that the life interest vested in possession. The investments therefore did not pass out of one person's hands into another's on the settlor's death. The accumulation of income was as much for the benefit of the tenant for life as any one else. This case, then, has nothing to do with such cases as *Scott* v. *Inland Revenue Commissioners* (3) and *Burrell & Kinnaird* v. *Attorney-General.* (4) The essence of both those cases was that the income was distributable before the critical date among a class of persons differing from the person or persons entitled to the benefit afterwards. Here the only change on the settlor's death was from a contingent to an absolute life interest, and that was held insufficient to cause estate duty to become payable under s. 1; *Adamson's* case (1); and see also *Attorney-General* v. *Lloyds Bank, Ld.* (2), where a test is laid down by Lord Tomlin which is directly applicable. The same principle is made clear by Lord Russell of Killowen in *Scott* v. *Inland Revenue Commissioners* (3) and *Burrell & Kinnaird* v. *Attorney-General.* (4) It is not right here to describe the trust for accumulation as being for the benefit of the remaindermen until the death of the settlor, when the tenant for life's interest was interposed. For these reasons the accumulations fund did not pass on the death of settlor so as to make estate duty payable under s. 1 of the Finance Act, 1894.

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(1) 1 Mac. & G. 551.
(2) 151 L. T. 268.
(3) [1937] A. C. 174.
(4) [1937] A. C. 286.

J. H. Stamp replied, and then said that the further question arose, if the Court thought the property did not pass on the death of the settlor under s. 1 of the Act of 1894, whether s. 2, sub-s. 1 (*b*), applied. If so, the property was deemed to pass on the death, because it was property in which the settlor or some other person had an interest ceasing on the death of the settlor. The children of Grace Stuart had such an interest in the accumulations fund which passed on the death of the settlor to Grace Stuart for life. This case therefore falls exactly within s. 2, sub-s. 1 (*b*). It was admitted that if sub-s. 1 (*b*) does not apply, the case comes within sub-s. 1 (*d*).

B. F. Mendel for the respondent. Sect. 2, sub-s. 1 (*b*), does not apply, first because, if the Court holds that s. 1 does not apply, it will be on the ground that the children's interest in the accumulations fund is the same before and after the death of the settlor. Secondly, the interest ceasing on the death of the settlor must, in order to bring the case within sub-s. 1 (*b*), be an interest in possession before the death. If a contingent interest was sufficient, death duty would still be payable on the whole property in view of the language of s. 2, sub-s. 1 (*b*), and of s. 7, sub-s. 7. Thirdly, there was at the most no cesser of the children's interest but only an interruption, and that does not suffice to make s. 2, sub-s. 1 (*b*), apply.

J. H. Stamp replied.

(1) [1933] A. C. 257.
(2) [1935] A. C. 382, 395, 396.
(3) [1937] A. C. 174, 183.
(4) [1937] A. C. 286, 299.

The second question asked in the summons was: "Whether, "for the purpose of ascertaining the rate of Estate Duty "payable on property passing on the death of the deceased, "the said accumulations fund at the death of the deceased, "or the amount of the said difference mentioned in paragraph (I.) hereof, or any other sum in respect of the said "accumulations fund, ought to be aggregated so as to form "one estate with the property or other property which passed "on the death of the deceased, or ought to be treated as an "estate by itself."

Farwell J. said that, as the accumulations passed in this case under s. 2, sub-s. I (*d*), and not under s. I, there was no binding authority on the question of aggregation, and he felt bound to form his own opinion on the matter.

In his judgment the contention that the settlor had an interest in the accumulations was not well founded. Having regard to s. 2, sub-s. I (*d*), the property passing on the settlor's death was not the property settled nor the whole of the beneficial interest in the fruit of that property. That which was deemed to pass was an annuity or other interest provided by the settlor to the extent of the beneficial interest accruing or arising. In his judgment the settlor never had an interest within the meaning of the section. For these reasons this was not property within s. 4, and was not therefore property to be aggregated with the settlor's other property.

The Crown appealed. The argument on this question was heard on November 16, 17, 18.

J. H. Stamp for the Attorney-General. On the question of aggregation it was said by the other side that the accumulations were never the property of the deceased and therefore that the accumulations fund could not be aggregated with other property passing on his death. The answer is that the deceased owned the property settled by him and that carried the future income with it. The ownership of a fund gives a right to all the future income, and a right to that future income is an interest of that owner. It follows that the accumulations of future income are aggregable with other property passing on the owner's death under s. 4 of the Finance Act, 1894. The proviso to s. 4 does not apply. It is sufficient that the settlor ever had an interest in the accumulations fund. A settlor could not settle any property in which he had not an interest apart from his exercising a special power of appointment, and of that there is no question here. If the trust of the accumulations fund failed, there would be a resulting trust to the settlor, and that can only be because it was property of his of which he had not fully disposed: see *In re Thorley.* (1) It is admitted here that, if the accumulations did not pass on the death under s. 1 or was not deemed to pass on the death under s. 2, sub-s. 1 (*b*), then it was deemed to pass on the death under s. 2, sub-s. 1 (*d*). In order that property should be deemed to pass on the death under s. 2, sub-s. 1 (*d*), it must have been the property of the deceased, so as to give rise to aggregation.

[CLAUSON L.J. Could it be predicated of a settlor at the date of the settlement that he had an interest in an investment which then had no existence ?]

The future income arising from a settled fund is something in which the settlor had an interest, and it makes no difference that the future income is accumulated and invested.

[SIR WILFRID GREENE M.R. Is it said that, when the owner of income-bearing property dies, one of the things that passes is the right to future income, and, if so, it is taxed ?]

Yes, the property is taxed with all its capacity to produce income. Thus, if a testator on his death directs the accumulation of the income for twenty-one years and then gives the property to A and the accumulations to B, there is no estate duty payable in respect of the accumulations because they have already been the subject of tax as part of the property at the testator's death. The general principle that the ownership of property carries with it the future income receives support from *In re Tong* (2), where the undisposed of income of residue was held to be an interest undisposed of by the testator. Sect. 7, sub-s. 1 (*a*) and sub-s. 6, assist this contention.

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(1) [1891] 2 Ch. 613.

(2) [1930] 2 Ch. 400; [1931] 1 Ch. 202.

C. A.
1938

HODSON'S SETTLEMENT, *In re.*
BROOKES *v.* ATTORNEY-GENERAL.

So far the matter has been considered on principle, but there are also authorities bearing on the point. *Attorney-General* v. *Dickinson and Baron* (1) is directly in point and confirms the appellant's argument. Two other cases that assist the same view are *Attorney-General* v. *Quixley* (2) and *Attorney-General* v. *Pearson* (3), and in each case it was pointed out that "interest" was a word of the widest possible meaning. Lastly, the second of the two decisions in *Attorney-General* v. *Adamson* (4) relating to succession duty assists the appellant, because, in order to see whether there was a succession, it was necessary to determine the person from whom the interest of the successor was derived, and the passing of the accumulations fund was held to constitute a succession in the Court of first instance and the Court of Appeal.

Cyril Radcliffe K.C. and *B. F. Mendel* for the respondent. The Crown is bound to bring their case strictly within the terms of the Finance Act, 1894. It is plain that at no time did the settlor possess any interest in the fund whatever. That is because under the system of law applying in this country no one can have an interest in non-existing property. All the settlor did in this case was to part with all interest in a block of shares at a certain date. It is said that he parted with an income-bearing fund, but the shares merely represented a share in the property of a company, and, unless profits were made, no dividends would ever come into existence. Any such profits were not in existence at the date of the settlement, and therefore they were not capable of being the subject of an interest at law, whether legal or equitable. It is well recognized that no one can assign future property at law, and it can only be done in equity under a contract which passes no interest till the property comes into existence: see *Glegg* v. *Bromley*. (5) How then, it will be asked, can such property be disposed of? Under a system of law which admits of trusts, existing property can be given to a trustee so as to part entirely with any interest in the

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(1) [1937] 2 K. B. 574.
(2) (1929) 141 L. T. 288.
(3) [1924] 2 K. B. 375.
(4) [1932] 2 K. B. 159.
(5) [1912] 3 K. B. 474, 490.

C. A.
1938
HODSON'S SETTLEMENT, *In re.*
BROOKES *v.* ATTORNEY-GENERAL.

property, and yet control can be exercised over his ownership of that property for the future, so as to bind the trustee to deal with future accretions in the way the settlor directs. That does not mean, however, that the settlor ever had an interest in the accretions which came into existence after he had parted with the property. Without a system of trusts the disposition of a future interest could not be controlled. The " interest " referred to in s. 4 of the Act of 1894 must be an interest known to the law. That is what " interest " means in s. 2, and it must have the same meaning in s. 4. If the Crown's contention was right, it would mean that the Crown with unwonted generosity allowed a subject-matter of tax to pass on death free of tax. The interest of any person under a settlement referred to in s. 5, sub-s. 3, means an interest in property and not income. A tenant for life is not properly described as having an interest in future income, but as having an interest in property known to the law. Sect. 7, sub-s. 1 (*a*), has been referred to, but it throws no light on s. 4. If " interest " means an interest known to the law in s. 4, it will bear the same meaning in s. 7, sub-s. 1 (*a*). Nor is there anything in the use of the words "interest in expectancy" in s. 7, sub-s. 6, words which are defined in s. 22, sub-s. 1 (*j*), to cause a different view to be taken.

It follows that the Act does not disclose any ground for giving to the word " interest " in s. 4 a meaning not known to the law: *Holroyd* v. *Marshall.* (1) Had the settlor in the present case sought, when he made the settlement, to convey or assign the future interest (at the time not in existence), he would have had nothing to convey or assign. [They referred to *Collyer* v. *Isaacs.* (2)] In *Attorney-General* v. *Quixley* (3) the Court of Appeal decided that certain property passed on a ground different from that which had led Rowlatt J. to take this view. [They referred to *Attorney-General* v. *Robinson* (4) and *Attorney-General* v. *Dickinson and Baron.* (5)]

" Future property " is an expression covering different conceptions. It may mean property formed by alluvium at some future date, or the future normal fruit of an estate. Further future property may arise directly out of an existing chose in action owned by a man at his death, e.g., a policy, and then he has at least this extent of interest in the future property, that he is the owner of a chose in action that will, he knows, give a right to payment of a specified sum at his death. But what the Court is dealing with here is not even that, because it is dealing with ordinary shares, and the question arises in respect of dividends on these shares which were declared after the date of the settlement. They were not secured by any contract to which the settlor was entitled, because there is no chose in action with respect to dividends until they are declared. There is not even an inchoate right.

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(1) (1862) 10 H. L. C. 191, 210.
(2) (1881) 19 Ch. D. 342, 351.
(3) (1929) 141 L. T. 288.
(4) [1901] 2 I. R. 67.
(5) [1937] 2 K. B. 574.

J. H. Stamp replied.

1939. Jan. 20. CLAUSON L.J. read the judgment of the Court (Sir Wilfrid Greene M.R., Scott and Clauson L.JJ.). The relevant facts in this case are as follows: Mr. Hodson by a settlement of May 20, 1925, settled a fund of 20,000 shares in the names of trustees, upon trust to pay to a lady out of the income 1200*l.* per annum during the joint lives of the lady and himself, and invest and accumulate the surplus income of the fund during the same joint lives. The accumulations fund was to be held in trust to supplement any deficiency in the income of the settled fund to supply the 1200*l.* a year, and from and after Mr. Hodson's death the income of the accumulations fund was during the rest of the lady's life to be paid to her. By virtue of this settlement and a supplementary settlement the surplus income of the settled fund during the period of the lady's survivorship of the settlor was to be dealt with as is mentioned in the supplementary settlement, and on the lady's death the originally settled fund and the accumulations fund were by virtue of the settlement to be held in trust for her children. Mr. Hodson died in the lifetime of the lady on March 3, 1933.

There is no doubt that upon the coming into operation of the settlement, Mr. Hodson lost all possibility of benefit from the future accumulations; and thenceforward the beneficiaries of the accumulations fund as it accumulated (disregarding, for the sake of simplicity, the function of that fund as an additional security for the 1200*l.* annuity) were the lady (as regards a life interest to commence on Mr. Hodson's death) and her children (as regards various contingent interests which could not become interests in possession while their mother's life interest continued). On the death of Mr. Hodson no change took place in the beneficial interests in the capital of the accumulations fund so far as the lady's children were concerned, but their interest in the income of the accumulations fund was materially altered, in that they lost the right to require that income to be accumulated for their ultimate benefit. So far as the lady was concerned her interest, which had previously been contingent on her surviving Mr. Hodson, became an immediate interest in possession to continue for her life. For simplicity we omit any reference to certain forfeiture provisions which have never come into operation and do not affect the questions in dispute.

No question arises in regard to the estate duty payable in respect of the settled fund: but the first question raised by the summons is as to the duty, if any, payable, on the occasion of Mr. Hodson's death, in respect of the accumulations fund.

It will be observed that on Mr. Hodson's death the income of the accumulations fund which up to that point the trustees were bound, on receipt, to accumulate would cease to be subject to accumulation, and would become payable to the lady. It was argued for the Crown that, within the meaning of s. 1 of the Finance Act, 1894, this change in the destination of the income resulted in the accumulations fund "passing" on Mr. Hodson's death, and that duty was accordingly payable under that section on the occasion of Mr. Hodson's death. On behalf of the subject it was denied that on Mr. Hodson's death there was any "passing" under that section, whatever might be the position under s. 2.

It appears from Lord Parker's speech in *Attorney-General* v. *Milne* (1) that the expression "passing" on the death is

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(1) [1914] A. C. 765, 779.

C. A.
1939
HODSON'S SETTLEMENT, *In re.*
BROOKES *v.* ATTORNEY-GENERAL.

used in s. 1 of the Finance Act, 1894, to denote some actual change in the title or possession of the property as a whole which takes place at the death. In the present case the property as a whole is the accumulations fund: and it would appear prima facie that, applying Lord Parker's words, it is not open to this Court to hold otherwise than that on Mr. Hodson's death the accumulations fund passed. Up to the death the income was subject to a trust for accumulation for the ultimate benefit of the lady and her children. Upon the death this trust ceased and the lady became thenceforward for the rest of her life the sole beneficiary in the income of the fund. It is true that before the death the lady had an interest of a contingent character in the income of the fund, since she had a right to have it accumulated so as to provide a fund the fruit of which would, if she survived Mr. Hodson, come to her; but this circumstance would not prevent the change in the beneficial possession of the property as a whole which took place on Mr. Hodson's death from operating as a "passing" of the property on his death. It is settled by the decision of the House of Lords in *Burrell & Kinnaird* v. *Attorney-General* (1) that the mere fact that a person who becomes entitled to the beneficial enjoyment of property on a death has already before the death had some beneficial interest in the property does not prevent the property passing under s. 1.

The learned judge nevertheless felt himself bound to decide that the accumulations fund did not pass under s. 1. He pointed out that, had there been no life interest given to the lady, and had the only beneficiaries been her children, the fact that on Mr. Hodson's death the accumulation ceased would not have resulted in a passing of the fund on his death, in view of the decision in *Adamson* v. *Attorney-General* (2), and so far we find ourselves in agreement with him. He, however, felt himself bound by the decision of this Court in the year 1934 in *Attorney-General* v. *Lloyds Bank, Ld.* (3), to decide that the *Adamson* case (2) laid down certain principles which prevented him from holding that the change in the beneficial

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(1) [1937] A. C. 286, 301.
(2) [1933] A. C. 257.
(3) 151 L. T. 268.

C. A.
1939
Hodson's Settlement, In re.
Brookes v. Attorney-General.

title to and the possession of the income of the fund occurring on Mr. Hodson's death resulted in a passing of the property on his death. The principles which it is suggested are so laid down may, we think, be thus formulated: if on the settlor's death the accumulations cease, that circumstance alone, it is suggested, does not constitute a passing; if on the settlor's death an interest which was previously defeasible becomes indefeasible, that again, it is suggested, does not constitute a passing; if on the death an interest which had previously been deferred in point of possession becomes an interest in possession, that again, it is suggested, does not constitute a passing. If that be a correct statement of the principles recognized by this Court in *Attorney-General* v. *Lloyds Bank, Ld.* (1), and if those principles have not been corrected in the House of Lords in subsequent cases, it would seem to follow that, as Farwell J. held, a Court of first instance ought to apply those principles in the present case. So applying the principles, Farwell J. held that in the present case the cesser of the accumulations could be disregarded; there was no question of a defeasible interest becoming indefeasible; there was no doubt that an interest, namely, the life interest of the lady, which had previously been deferred in point of possession, became on the death an interest in possession, but that ex hypothesi did not constitute a passing. We agree that, given the premises, the conclusion follows, and that it may well be that Farwell J., sitting as a judge of first instance, had no other course open to him but to decide as he did that on the death of Mr. Hodson the accumulations fund did not pass for the purposes of s. 1 of the Finance Act, 1894. But now that the matter is before this Court, the situation is altered in two respects. The first is this. The decision of this Court in *Attorney-General* v. *Lloyds Bank, Ld.* (1), has been held by the House of Lords to have proceeded upon a wrong construction of the material deed, and that means that the principles enunciated in the judgments in this Court, though entitled no doubt to the most serious consideration, have been formulated in regard not to the correct but to a hypothetical

(1) 151 L. T. 268.

C. A.
1939
HODSON'S SETTLEMENT, *In re.*
BROOKES *v.* ATTORNEY-GENERAL.

and in fact erroneous view of the meaning and effect of the material deed. In our judgment this circumstance leaves it open to this Court to refuse to accept the stated principles as necessarily correct. But another, and perhaps more important alteration has taken place in the situation. The principles to be deduced from the decision of the House of Lords in the *Adamson* case (1) have been considered by their Lordships and authoritatively expounded by Lord Tomlin with the assent of Lords Atkin, Russell of Killowen, Macmillan and Wright, upon the occasion of the appeal from the very decision in *Attorney-General* v. *Lloyds Bank, Ld.* (2), already mentioned; and there are some other recent decisions in the House of Lords which may throw light on the matter. It is necessary to review all these authorities in some detail before coming to a conclusion how far, in light of them, the principles formulated in this Court in the case of *Attorney-General* v. *Lloyds Bank, Ld.* (3), can be applied without modification to the present case.

In the case of *Adamson* v. *Attorney-General* (1), a settlor had by a settlement dated March 24, 1924, settled a fund in the hands of trustees upon trust for accumulation during his life; on his death the fund was to be held in trust for his children. The testator reserved to himself powers of disposition over the capital and income of the fund in favour of the children which were not exercised. It was held by a majority of the House that the property had passed to the children, subject to various possibilities of defeasance, on the making of the settlement: that on the death, although those possibilities of defeasance ceased, nothing more happened, and in particular the property did not pass within the meaning of s. 1 of the Finance Act, 1894.

In May, 1934, the case of *Attorney-General* v. *Lloyds Bank, Ld.* (3), came before this Court.

The effective trust was to accumulate the income until a mother's death and thenceforward to hold the fund and the accumulations in trust (as this Court construed the trust) for her daughters for life and subject to their life interests for their children and issue. This Court held in effect that the property had passed on the settlement to the daughters and their children, and that before as well as after the death the daughters and their children were the cestui que trustent, and that there was no "change" on the mother's death which amounted to a "passing." It is to be observed that before the death of the mother, as each item of income, whether of the original fund or of the accumulations fund, accrued, that item of income had to be capitalized, i.e. (on the construction of the settlement adopted by the Court) the three daughters had no interest in it except the right to have it capitalized and, thus, to have the fruits of it accruing after the mother's death, while the children of the daughters would be entitled (subject, of course, to their parents' life interests) to the items of income in question as capital with a like title to its fruit accruing before the mother's death : upon the mother's death an alteration of rights occurred (we pass by for the moment the question whether the alteration could be said to be such a change as to effect a passing within s. 1 of the Act) in that as from the mother's death the children of the daughters ceased to have any interest, so long as their respective parents lived, in the items of income accruing, whether in respect of the settled fund or in respect of the accumulations : those items of income and all like items accruing during their respective lives became the absolute property of the daughters. It will be observed that the mother's death had the direct effect (to be contrasted with the mere abolition of a possibility of defeasance) of placing in the hands and ownership of the daughters the income accruing as from that date whereas the income accruing previously to that date had, as it accrued, become subject to trusts primarily for the children of the daughters as capital, though no doubt the future fruits (after the mother's death) of the capitalized sums would enure for the daughters' benefit.

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(1) [1933] A. C. 257.
(2) [1935] A. C. 382.
(3) 151 L. T. 268.

Whether or not the attention of this Court was drawn to the characteristics of the settlement in this form there are no means, so far as the printed reports go, of saying ; but on a study of the judgments of this Court it must, we think, be taken that this Court was of the opinion that it was precluded by the decision in *Adamson's* case (1) from holding that the alteration of rights spoken of above as accruing on the mother's death amounted to such a " change " as to effect a " passing " within s. 1 of the Act on the mother's death.

The case went to the House of Lords and is reported there. (2) In the House of Lords it would appear from the printed case for the Crown, a copy of which was furnished to us, that the Crown's contention was that the alteration in rights to which we have drawn attention was such a " change " as to effect a " passing " within s. 1 of the Act: the point is put in detail in the following " reasons " numbered 1, 2, 3 and 4.

1. Because the decision of the House of Lords in *Cowley* v. *Inland Revenue Commissioners* (3) established the principle that settled property passes under s. 1 of the Finance Act, 1894, to a tenant for life thereof when his life interest falls into possession and the opinions of the majority of the House of Lords in *Adamson* v. *Attorney-General* (1) contain nothing inconsistent with this principle.

2. Because the opinions of the majority of the House of Lords in *Adamson* v. *Attorney-General* (1) are not—as was assumed in the judgments appealed from—founded upon the simple proposition that by the settlement the deceased had in his lifetime wholly divested himself of the property alleged to have passed upon his death, but upon that proposition coupled with the further proposition that the interests of the children of the deceased under the settlement were immediate interests though defeasible during the lifetime of the deceased, and the second of these propositions was and is essential to the decision of the majority of the House of Lords in that case and is inapplicable to the present case.

3. Because the judgments appealed from disregard the essential fact that in the present case the life interests of the children of the deceased under the settlement were reversionary life interests taking effect upon the death of the deceased,

(1) [1933] A. C. 257.
(2) [1935] A. C. 382.
(3) [1899] A. C. 198.

and not immediate life interests taking effect upon the execution of the settlement.

4. Because the judgments appealed from involve affirming the proposition (which it is submitted is wholly inadmissible) that settled property can for the purposes of the Finance Act, 1894, pass to a tenant for life thereof as tenant for life before the happening of the event upon which his tenancy for life is limited to begin.

The contention of the subjects is set out in their printed case in the following reasons, lettered C, D and E.

C. Upon the death of Mrs. Butler the beneficial interests of the three children and their issue who between them were absolutely entitled to the trust fund and the accumulations of income remained unaltered with this qualification that they were no longer defeasible.

D. In *Adamson's* case (1) it was held that inasmuch as the settlor in that case had completely divested himself of all beneficial interest in the settled property (the legal title to which was vested in the trustees of the trust instrument) and made a gift of it to the cestuis que trust under the settlement in question in that case the change in the character of the interests of the beneficiaries from defeasible to indefeasible interests did not constitute a "passing" of the settled property within the meaning of s. 1 of the Finance Act, 1894.

E. The only difference between *Adamson's* case (1) and the present case is that the interests of the beneficiaries in that case were absolute while in the present case the absolute interest is divided up between tenants for life and remaindermen; and this difference is immaterial to the application of the principle of *Adamson's* case (1) to the present case.

It would appear from the report of the hearing in the House of Lords that the Crown's case as argued consisted in putting to the House the reasons set out above. Counsel for the subject, so far as the report shows, based their argument on the proposition that the daughters were not persons with reversionary life interests taking effect on the death of the

(1) [1933] A. C. 257.

deceased, but took absolute interests defeasible in the event of the birth of issue or of death without issue, and if that proposition was, on the construction of the settlement, true, the inevitable conclusion, as their Lordships held, was that the interests of the children were throughout absolute, though liable to defeasance pro tanto in the relevant events. The death of the mother did not even, on this view of the construction of the settlement, operate to change any interest from a defeasible to an indefeasible interest. It merely operated to stop an accumulation of a fund which, subject to the possibility of defeasance, was as well after the death as before the absolute property of the daughters subject to an accumulation which, as Lord Tomlin points out, might, as well after the death as before, but for the possibility of defeasance, have been stopped by the daughters.

The speech of Lord Tomlin indicates clearly that in his view the question propounded by the Crown in reasons 1, 2 and 3, which I have cited above, did not arise: and in those circumstances the last paragraph but one in his speech (1) becomes most significant. That paragraph is as follows:—

"Further, having regard to some of the observations in the "Courts below, I may perhaps also venture to observe that the "ratio decidendi in *Adamson* v. *Attorney-General* (2) is not "that on the execution of the settlement the beneficial interest "in the whole fund passed out of the settlor but that it passed "out of the settlor to the children whose interest was the "same both before and after the death of the settlor subject "only to this, that a possibility of defeasance came to an "end with the death and that the cesser of that possibility of "defeasance did not constitute a passing." It is to be noted that these observations are, at the least, not in conflict with the view that the propositions put forward in reasons 1, 2 and 3 of the printed case for the Crown are sound but not applicable to the will as the House construed it. The four other learned Lords present expressed themselves as in accord with Lord Tomlin's opinion. The decision of the House appears to be quite consistent with the view that, if the true construction

(1) [1935] A. C. 397.

(2) [1933] A. C. 257.

of the deed had been that adopted in the Court of Appeal, the decision would have been in favour of the Crown and not, as it in fact was, in favour of the subject.

In November, 1934, after the decision of this Court in *Attorney-General* v. *Lloyds Bank, Ld.* (1) but before the determination of that case in the House of Lords, the case of *Scott* v. *Inland Revenue Commissioners* (2) came before this Court. The matter in question was as to the duty payable on the death of one whom we will, for convenience, call C. Immediately before C's death, rents and profits of the estate were receivable by certain trustees whose duty it was, after keeping down incumbrances, to apply the same at their discretion for the benefit of such members of a defined class of beneficiaries as they might think fit, a class which included C and C's eldest son. On C's death this trust ceased and the estates became vested in possession in C's eldest son as tenant in tail. Bennett J. had held that the estates "passed" on C's death and thereupon attracted duty under s. 1 of the Act. In this Court his decision was affirmed, and Maugham L.J. (3) had occasion to express his view of the grounds of the decision in *Adamson's* case. (4) He said: "what they "held was that upon the death of the settlor in that case "the beneficial interests in the property did not pass, because "the only effect of the death was to render impossible the "happening of any of the events which would have deprived "the successors—if I may so describe them—of their interests. "On that view, the property did not change hands. That, "I think, in its simplest form is the result of the decision in "*Adamson's* case (4)." Maugham L.J. found no difficulty in accepting the proposition (which for convenience we have restated in the terms used above in stating the material limitations in the *Scott* case (3)) that, if the estate is settled upon discretionary trusts for a number of persons during the life of C, and on C's death for C's eldest son in tail, then on the death of C the property passes: and that whether or not C was an object of the discretionary trusts. The material point on which, in his Lordship's view, attention is to be fixed is the fact that the discretionary trusts came to a complete end on the death of C. The property then, in his Lordship's opinion, changes hands as a whole and C's eldest son, who obviously before the death had no beneficial interest in possession, becomes the tenant in tail in possession of the whole property. We may venture to add that there is a further proposition which follows from those thus stated and which his Lordship would, we think, have affirmed, had it been material to the matter then in hand—namely, that the property changed hands as a whole notwithstanding that the interest of C's eldest son before as after the death was unchanged save only that from being a future interest it became on C's death an immediate interest in possession. In other words, there will be a passing when the only change is that one interest in possession ceases and another interest in possession (previously a mere interest in futuro) takes its place. We mention this merely in order to make clear a proposition upon which some doubt might conceivably have been cast in view of a possible (though, we think, erroneous) construction of certain language used by Lord Wright in the case of *Adamson* v. *Attorney-General.* (1)

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(1) 151 L. T. 268.

(2) [1935] Ch. 246.

(3) [1935] Ch. 246, 265.

(4) [1933] A. C. 257.

In the House of Lords the judgments of Bennett J. and of the Court of Appeal in *Scott* v. *Inland Revenue Commissioners* (2) were affirmed. It is important to note that in the judgment of the House, delivered by Lord Russell of Killowen, it is clearly laid down that when the estate in tail male of C's eldest son became on the death of C an estate in tail male in possession instead of an estate tail in remainder, when, that is to say, C's eldest son became entitled to receive the income which immediately before C's death was primarily applicable for the benefit of the objects of the discretionary trusts, there was a change of hands in the beneficial title or possession of the property as a whole which constituted (see per Lord Parker in *Attorney-General* v. *Milne* (3)) a passing of the property on C's death. Lord Russell of Killowen then

(1) [1933] A. C. 257, 287.

(2) [1935] 1 Ch. 246; [1937] A. C. 174, 182.

(3) [1914] A. C. 765, 779.

C. A.
1939
HODSON'S SETTLEMENT, *In re.*
BROOKES *v.* ATTORNEY-GENERAL.

adverted to *Adamson's* case (1) and referred (as we read it) with approval not only to Lord Tomlin's pronouncement in the *Lloyds Bank* case (2) but also to the observations, which we have ventured to abstract above, of Maugham L.J. in the case under consideration. His Lordship then proceeded to state once more the foundation of the decision in *Adamson's* case (1) and pointed out, as we read his observations, that that case covers, and covers only, a case where it can be predicated that the beneficiaries before and after the death were the same, and that their interests before and after the death were the same, save only that their interests, which before the death were subject to alteration or defeat, ceased on the death to be so subject. No " changing hands " resulted from the possibility of alteration or defeat having been eliminated, and therefore there was no "passing" on the death.

We do not find it necessary to deal in detail with any other reported cases on this topic. It is sufficient to note that in *De Trafford* v. *Attorney-General* (3) the House of Lords a few days before the decision in *Attorney-General* v. *Lloyds Bank, Ld.* (2), found no difficulty in holding that, whereas before the relevant death the rents and profits of certain equities of redemption were subject to trusts, first for payment thereout of 8000*l.* a year to the date of the relevant death, and next for the application thereof on various discretionary and other trusts, there was a " passing " of the whole of the equities of redemption (including the " slice " required to provide the 8000*l.* a year) when on the relevant death the 8000*l.* a year ceased to be payable and the remaining trusts of the rents and profits came to an end, and the beneficiary of the 8000*l.* annuity became tenant for life in possession of the whole of the rents and profits of the equities of redemption. The decision is, of course, completely in line with the later decision of the House of Lords in *Scott* v. *Inland Revenue Commissioners* (4), and merely emphasizes the position that, if the death is the occasion of a future life interest becoming

(1) [1933] A. C. 257.
(2) [1935] A. C. 382, 397.
(3) [1935] A. C. 280.
(4) [1937] A. C. 174.

C. A.
1939
HODSON'S SETTLEMENT, *In re.*
BROOKES *v.* ATTORNEY-GENERAL.

a life interest in possession, the death is the occasion of such a "change of hands" as results in a passing within s. 1 of the Act. This position is again emphasized by the decision of the House of Lords in *Burrell & Kinnaird* v. *Attorney-General* (1), where, however, the case was not one in which, on the relevant death, a simple life interest came into possession: the matter was complicated by the fact that the life interest which came into possession was an interest "pur autre vie" in trustees charged with the duty of applying the income during the continuance of their interests for the benefit of certain beneficiaries, some of whom had during the period immediately before the relevant death been similarly interested under a like trust which came to an end on the relevant death.

This lengthy survey of the authorities leads us to the conclusion that, omitting for the moment the judgments of this Court in *Attorney-General* v. *Lloyds Bank, Ld.* (2), the decided cases not only contain nothing inconsistent with the view which we have expressed above, that in the present case the accumulations fund "passed" within the meaning of s. 1 of the Finance Act, 1894, on Mr. Hodson's death, but make it necessary for this Court so to decide. In our judgment, this Court is bound, in view of the later authorities, to hold that the view taken by this Court in *Attorney-General* v. *Lloyds Bank, Ld.* (2), of the principles to be applied in such cases as the present must now be recognized to have been deficient, in that it failed to bring out the crucial point that, in order to arrive at a correct decision, attention must be focussed upon a comparison between the persons beneficially interested in the fund the moment before the relevant death and the persons so interested the moment after the death, and upon the question whether the death effected an alteration in rights as distinguished from merely removing the possibility of an alteration. Accordingly, if the persons beneficially interested are the same before and after the death, and the death merely removes the possibility of an alteration of their rights, as was, in the view of the House of Lords, the case in

(1) [1937] A. C. 286. (2) 151 L. T. 268.

Attorney-General v. *Lloyds Bank, Ld.* (1), there is no passing: whereas in the present case, while the beneficiaries are no doubt the same, before as after the death, but the death brings one set of trusts of income to an end and shifts the beneficial interest in the income to the possession of one who (though no doubt previously a contingent beneficiary) had no beneficial interest in possession before the death, there is a "passing" within s. 1 of the Act.

For these reasons, we are of opinion that the first declaration in the order of Farwell J. of May 25, 1938, should be discharged, and that a declaration should be substituted that estate duty is payable upon the death of Mr. Hodson in respect of the accumulations fund under s. 1 of the Finance Act, 1894, on the principal value of that fund.

The second question raised by the summons turns on the application to the facts of the case of s. 4 of the Finance Act, 1894. The material provisions of that section as amended by subsequent Acts are (*a*) that for determining the rate of estate duty to be paid on any property passing on the death of the deceased, all property so passing in respect of which estate duty is leviable shall be aggregated so as to form one estate, and the duty shall be levied at the proper graduated rate on the principal value thereof; but (*b*) any property so passing in which the deceased never had an interest shall not be aggregated with any other property but shall be an estate by itself, and the estate duty shall be levied at the proper graduated rate on the principal value thereof. The necessity for some such provision in order to obviate the grossest injustice seems obvious. It has not been uncommon to find in wills and settlements provision for the continuance of a certain set of trusts during the life of the survivor of a class (for example, descendants of King Edward VII. living at the date of the settlement), followed by different trusts to arise on that survivor's death: such a disposition might well result in a passing on that survivor's death. But for some such provision as that made in s. 4, the beneficiaries under the will of the survivor of the class might find themselves saddled with duty at a very high rate through the action of strangers in indicating—as the event happens—their testator as the person on whose death the property of an entire stranger was to pass.

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(1) [1935] A. C. 382.

It is, we venture to think, permissible in construing the section to bear its obvious legislative genesis in mind; but this does not dispense the Court from the necessity of ascertaining the fair meaning of the expressions used in the section, in its application to the facts of the particular case under consideration. It was argued that the words must be read with the utmost strictness and that the Court was bound to examine the items comprising the property which passes in order to ascertain whether or not the testator ever had an interest in each such item of property. It was suggested that, if a settlor settles 10,000*l.* Consols, and in due course, in accordance with the trusts, the Consols are sold and the proceeds invested in Local Loans, and thereafter the event of passing occurs, the Court is bound to treat the Local Loans as "property in which the deceased never had an "interest." It was said that, if the deceased left estate which comprised, among other items, a policy of insurance on his own life, the proceeds of an action by his executors against the Insurance Company on the policy must be treated by this Court as "property in which deceased never had an "interest." It was accordingly argued, applying this construction to the present case, that it was impossible to say that Mr. Hodson ever had an interest in the accumulations fund, since the accumulations fund necessarily arose after he had, by the execution of the settlement, parted with all ownership in the fund from which the accumulations arose. We cannot bring ourselves to believe that this Court is bound to construe the phrase with such paradoxical narrowness. Under different circumstances different tests may well be applicable. But one test was suggested by counsel for the Crown as being properly applicable to the facts of the present case which, in our judgment, may fairly be adopted, without prejudice, of course, to the adoption of other (and perhaps wider) tests in the appropriate circumstances. That test is to ask the question in whose favour there would be a resulting trust of the accumulations fund in case all the beneficiaries under the disposition under which the property passes were to disclaim the benefits conferred on them by the disposition ; and it was suggested that, if the answer is (as, of course, it must be) that the resulting trust would be in favour of the deceased, or in favour of his representatives as such representatives, the Court would be bound to hold that the property is property of which it would be untrue to say the deceased never had an interest in it. In our judgment, that test is a sound one in this particular case, and is in consonance with the intentions of the Legislature as properly gathered from the language of the section. To apply that test is to treat the Legislature as fixing attention not on the items which make up the corpus which passes on the death, but on the corpus which is the subject-matter of the disposition under which the " property passed " on the death, the identity of the individual items, varying, no doubt, from time to time as changes of investment take place, being of no consequence as compared with the identity of the corpus as that which was originally the subject of the disposition and is the object which passes. If it be right to treat the " property which passes " as the identifiable corpus, and thus to hold that the person who owned this corpus in its original form must be treated as " having had an interest " in this corpus, it having been his property before the creation of the trust, it surely must be right to treat the future produce of this corpus as something in which the original owner of the corpus cannot truly be said never to have had an interest. The test thus applied disposes of the dialectical difficulty raised by the suggestion that a settlor can be said never to have had an interest in the fund of Local Loans into which the original trust fund consisting of Consols has by reinvestment been converted ; and of the like difficulty raised by the suggestion that the owner of a policy of insurance on his own life cannot be said ever to have had an interest in the money recovered after his death from the Insurance Company. The truth is that the application of the test of what would occur on disclaimer brings out the fact that the beneficial interests in the accumulations fund, the Local Loans and the policy moneys in the various examples taken flow from the ownership of the settlor in the original settled funds and the policy respectively and have come into being by reason of his action in creating the settlement. The person who planted the tree cannot be said never to have had an interest in its future fruit, though the fruit may not mature until long after he has, in virtue of his ownership of the tree and of all its future fruit, alienated the future fruit.

The point has been the subject of decision in *Attorney-General* v. *Dickinson and Baron* (1), where Lawrence J. was dealing with a case where the property in question passed under s. 1 of the Finance Act, 1894, and came to the same conclusion as that which we feel bound to reach. Farwell J., having held that s. 1 does not apply to the present case, considered that the decision in *Attorney-General* v. *Dickinson and Baron* (1), relating, as it did, to a case to which s. 1 was applicable, was not binding on him, and proceeded to consider s. 4 in its application to a case under s. 2. We agree with Farwell J. that the fact that in *Attorney-General* v. *Lloyds Bank, Ld.* (2), the point was not pressed, indeed it seems to have been abandoned by the then advisers of the Crown, cannot be regarded as in any way conclusive. Treating the present case as one in which the property did not pass under s. 1 of the Act, but an " interest provided by the settlor " passed under s. 2, sub-s. 1 (*d*), Farwell J. held that the settlor never had an interest in that which passed. In the view that we take, that the property passed under s. 1, it is not necessary to deal with the hypothetical case of s. 2 being applicable. We agree with Farwell J. that the conclusion which Lawrence J. reached, and which we have reached, as to the proper construction of s. 4 in its application to the case now before this Court of property which passes under s. 1 does not necessarily cover the question as to the application of that section to property which is deemed to pass under s. 2, sub-s. 1 (*d*). We must not, however, be understood to agree with the view

(1) [1937] 2 K. B. 574.

(2) 151 L. T. 268.

C. A.
1939
HODSON'S SETTLEMENT, *In re.*
BROOKES *v.* ATTORNEY-GENERAL.

of Farwell J. on the latter question. As the point does not arise in this case, we express no opinion upon it.

In our judgment, the second declaration in the order of Farwell J. of May 25, 1938, should be discharged and a declaration should be substituted that the accumulations fund ought to be aggregated so as to form one estate with the other property which passed on Mr. Hodson's death.

It will follow that the costs of the Attorney-General of the summons and of this appeal should be paid by the plaintiff, Mr. Brookes.

Appeal allowed.
Leave to appeal to House of Lords.

Solicitors: *Solicitor of Inland Revenue; Cannon Brookes & Odgers.*

H. C. G.

SHARPE *v.* TOPHAMS, LIMITED.

C. A.

1939

Jan. 11.

Company—Articles of Association—Share certificate—Right of shareholder to obtain a subdivision of shares included in a single certificate.

The articles of association of a private company contained the following articles:—Art. 12: "Every member shall be "entitled to one certificate for all the shares registered in his "name or to several certificates each for a part of such shares. ". . . ." Art. 14: "Every member shall be entitled to one "certificate gratis but for every subsequent certificate issued to "him the sum of one shilling or such smaller sum as the directors "may determine shall be paid to the company":—

Held, that any shareholder of the company was entitled from time to time to require the company to issue to him in place of a share certificate for a number of shares, on payment of the appropriate amount, a number of certificates each for one or more shares, making together the number of shares included in the share certificate surrendered.

Appeal from the Vice-Chancellor of the County Palatine Court of Lancaster.

The plaintiffs were the trustees of the will of a deceased shareholder of the defendant company, Tophams, Ld., who at his death held 230 shares of 100*l.* each in the company. The defendant company was a private company with a capital of 100,000*l.* in 1000 shares of 100*l.* each and carried on the business of racecourse proprietor. At his death on December 30, 1932, the deceased owed 9000*l.* to his bank, which was secured by a deposit of 195 shares of the company. The trustees were anxious to retain the shares, which were the principal assets of the deceased's estate, and, it having become necessary to raise 7000*l.* for the purposes of the administration of the estate, raised the amount by pledging the remaining 35 shares and a further 35 shares that were released by the bank. Some time afterwards the sum of 7000*l.* had to be repaid, and it became necessary for this purpose to raise the sum by a number of small mortgages of shares to different persons. In order to carry this out the trustees from time to time applied to the defendant company for the issue of share certificates of smaller amounts.

For this purpose the trustees made four applications to the defendant company in 1937—namely, the first on January 20, 1937, for the subdivision of a certificate for 70 shares into two certificates for 50 and 20 shares respectively; the second on November 22, 1937, for the subdivision of a certificate for 50 shares into three certificates, two for 5 shares and one for 40 shares; the third in the same month for the subdivision of a certificate for 160 shares into one for 5 and one for 155 shares; and the fourth in December, 1937, for the subdivision of a certificate for 40 shares into four certificates for 5, 8, 10 and 17 shares respectively. All these applications were acceded to.

In February, 1938, a further application was made for the subdivision of a certificate for 17 shares into one for 13 and one for 4 shares, and this application was refused.

In these circumstances the trustees commenced proceedings for a declaration that they were entitled from time to time to have any share certificate for a number of shares subdivided; and they also asked for an order that the application made in February, 1938, should be complied with.

The question turned on the construction of the articles of association of the company, and the material articles were as follows :—

"11. The certificates of title to shares shall be issued "under the seal of the company and signed in such manner "as the directors shall prescribe.

"12. Every member shall be entitled to one certificate "for all the shares registered in his name or to several "certificates each for a part of such shares. Every certificate "of shares shall specify the numbers of the shares in respect "of which it is issued and the amount paid up thereon.

"13. If any certificate be worn out or defaced then upon "production thereof to the directors they may order the "same to be cancelled and may issue a new certificate in "lieu thereof and if any certificate be lost or destroyed then "upon proof thereof to the satisfaction of the directors or "in default of proof on such indemnity as the directors "deem adequate being given a new certificate in lieu thereof

C. A.
1939
SHARPE
v.
TOPHAMS,
LD.

"shall be given to the party entitled to such lost or destroyed "certificate.

"14. Every member shall be entitled to one certificate "gratis but for every subsequent certificate issued to him "the sum of one shilling or such smaller sum as the directors "may determine shall be paid to the company."

The Vice-Chancellor said that the first thing that struck him was that under the Companies Act, s. 67, a certificate as evidence of title must be ready for a member a certain time after allotment, and that art. 12 of the articles of the defendant company entitled the shareholder to one or several certificates. He was given a choice between having one certificate or having his shares divided up among several certificates. The member having exercised his choice, there was no indication that he could change his mind and have a subsequent chance of exercising his choice between these two alternatives. The shares here were 100*l.* each, but if they were 1*l.* shares it might be extraordinarily inconvenient to be always being asked for divisions. To his mind the articles did not express any intention of that sort, and that view was confirmed by art. 13, which made special provision as to worn out or defaced, lost or destroyed certificates. He had come to the conclusion that, having once exercised the option given by art. 12, shareholders had no right to demand of the directors that they should be given new documents of title, as claimed by the plaintiffs.

The plaintiffs appealed. The appeal was heard on January 11, 1939.

Spens K.C. and *J. J. Somerville* for the appellants. The importance of this question arises from the presumptive right of the directors under art. 21 to acquire at a fair price shares of any member that he is seeking to transfer; and, even if that right is not exercised, the member can by art. 23 only transfer to a member, unless no member can be found within a period fixed by art. 27. The question here turns, however, on the construction of arts. 12, 13 and 14. Art. 12 gives a member a right to one or several share certificates, and on

C. A.
1939
SHARPE
v.
TOPHAMS,
LD.

the true construction that is a right he can exercise from time to time as often as the need arises: see *Hyman* v. *Elandslaagte Collieries, Ld.* (1) This view is supported by art. 14, where the reference to "every subsequent certificate" goes to show that the Vice-Chancellor was mistaken in construing art. 12 as applying only when a person first becomes entitled to shares. The word "subsequent" is only appropriate when the shareholder has already received a certificate and wishes to get two or more certificates in its place. The words of art. 12 are so clear that there is no escape from them, and when art. 14 is read with art. 12 it affords strong support for what is the natural construction of art. 12. The present article is an exceptional one, for that in Palmer's Company Precedents, 15th ed., Part I., p. 603, art. 16, gives the directors a discretion in regard to issuing more certificates than one: see also Table A to the Companies Act, 1929. The material words are "or if the directors so approve."

Grant K.C. and *W. L. Blease* for the respondent company. The articles when properly construed afford a sound foundation for the decision of the Vice-Chancellor. The plain question is, do these articles entitle a member to keep changing his certificates? Can the holder of 10 shares come one day and ask for ten separate certificates and as soon as they are issued come and ask for a single certificate for all 10 shares? The articles are providing for two modes of getting shares into a person's hands, namely, allotment and transfer, and on its true construction art. 12 deals only with the moment of the original issue of certificates on either of those two events happening, and does not enable a member to whom a certificate or certificates have been issued to change them afterwards. The one exception to this is in art. 13, which provides for new certificates being issued to replace certificates that are worn out or defaced or that have been lost or destroyed. Reliance has been placed on art. 14, but it must be read with art. 13, and on its true construction is dealing with the charge to be made for certificates issued in place of those worn out, defaced, lost or destroyed. Thus the position is that on an allotment or transfer of shares the allottee or transferee can elect to have one or more certificates, and that thereafter his only right to change them is in cases falling under art. 13, and it is then that the charge of one shilling is made. There is nothing in the Companies Act, 1929, s. 67, to suggest that the Legislature is recognizing a right to split certificates except upon a transfer of part of a holding of shares.

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(1) (1921) 42 Natal L. R. 43.

[SIR WILFRID GREENE M.R. That cannot affect the construction of the articles.]

Although art. 12 is somewhat general in its terms, it should not be given a wide construction such as has been claimed for it. Were it construed so as to enable the plaintiffs to do what they wish, it would defeat the intention of keeping strangers out of the company, for, if parts of a shareholding could be mortgaged to different persons, they would control the member in the exercise of his voting power.

Again, the appellants cannot on any construction of the articles be entitled to a continuous stream of certificates. At the most they can only exercise their right to split certificates in a reasonable manner; and to ask for thirteen splits in little more than a year goes beyond any reasonable limit.

[No reply was called for.]

SIR WILFRID GREENE M.R. This appeal raises a short question of construction under certain articles in the articles of association of a private limited company, Tophams, Ld., which was incorporated in the year 1899. The appellants, the plaintiffs in the action, hold, in a representative capacity representing a deceased shareholder, a number of shares in the company. The shares are of the nominal value of 100*l.* each and are clearly of substantial actual value. For reasons connected with the administration of the estate of the deceased member, the plaintiffs are anxious to have or have been anxious to have the certificate of title to the shares which they hold split into a number of certificates. This operation they have been successful in obtaining on four occasions, but the fifth application for the issue of what for convenience may be called split certificates was refused by the Board.

Now the reasons which prompted the appellants to ask for the certificates to be split and the reasons which prompted the directors in refusing the last application are of no relevance to the present question; the whole question which we have to decide is a dry question of construction of the articles. If the plaintiffs are right, the object for which they desire this operation to be performed is immaterial. If the articles give the directors the power to do what they have done, their motive for so doing, at any rate in these proceedings, is totally irrelevant. The articles in question are a group of articles forming the second fasciculus in the articles of association of the company. The heading is "Certificates," and under that heading there are five separate articles. Art. 11, the first of them, says: "The certificates of title to shares "shall be issued under the Seal of the Company and signed "in such manner as the Directors shall prescribe." Then comes art. 12, which is the article most directly in issue in the present controversy: "Every member shall be entitled "to one certificate for all the shares registered in his name "or to several certificates each for a part of such shares." And then it provides that every certificate of shares shall specify the number of the shares to which it relates.

Now it was held by the learned Vice-Chancellor, and it has been argued on behalf of the respondents in this Court, that the sentence which I have quoted from art. 12 is confined in its operation to two points of time: (1.) the point of time when a certificate falls to be issued to a person who has become a shareholder by allotment, and (2.) the point of time when a certificate falls to be issued to a person who has become a member by transfer. Of course, if that construction were correct, the articles, as so construed, would confer no right upon a shareholder to ask for his certificate to be split, but in my opinion it is not permissible to limit the language of that sentence in art. 12 in that way. First of all, the language used does not, in terms, so limit it. It is quite general and is stating the rights of a member in respect of the documentary title to the shares which he is to hold. Further, if one is looking at the matter of convenience, it would certainly be very inconvenient if a member had to decide, once and for all, without any possibility of obtaining an alteration suitable for changed circumstances, exactly how many certificates he wanted and how he wanted to divide up his holding into blocks of shares. Now, of course, ordinarily where there are no restrictions on transfers, considerations of that kind would not be of very great importance, because if a member had not the right, under the articles, to split his holding in such a way as to receive two or more certificates in respect of it he could always procure the same result by a transfer of a part of his holding to a nominee. In the present company no such device would be possible, because, owing to very stringent restrictions on transfer, every transfer calls into operation the right of pre-emption of the directors and, after them, of the other shareholders in the company. Accordingly, the construction which the learned Vice-Chancellor has placed upon these words would mean that a shareholder must decide, at the moment when he becomes a shareholder, whether by allotment or on transfer, once for all, irrevocably, with no possibility of obtaining a change, the exact way in which his holding is to be divided up among the certificates, and it may very well be that the articles were framed in the general way in which they were framed with that construction in mind; but however that may be, I am unable to accept the suggested argumentum ab inconvenienti, because it seems to me, on balance, the inconvenience lies on the side of the construction which has been adopted by the learned Vice-Chancellor. But the matter does not rest there, because there are two other articles to which I must refer. Art. 13, which I need not quote at length, provides for the issue of new certificates in place of worn out, defaced or destroyed certificates. Under that article the directors are to issue a new certificate, in lieu of the one which is worn out, defaced, lost or destroyed, as the case may be. Now that article contains no provision for a fee to be paid in respect of such a new certificate. Art. 14—again quite general in its terms—starts off by saying: "Every member shall be entitled to one certificate gratis"—and it continues in the following words: "but for every

C. A.
1939
SHARPE
v.
TOPHAMS,
LD.

Sir Wilfrid
Greene M.R.

"subsequent certificate issued to him the sum of one shilling "or such smaller sum as the directors may determine shall be "paid to the company." It is argued by Mr. Grant that that provision referring to "every subsequent certificate" is limited to the case of new certificates issued under art. 13 in place of worn out, or defaced, lost or destroyed, certificates. I can find no justification for reading the quite general words of art. 14 under any such limitation. If it had been intended that those words referring to the issue of subsequent certificates on payment of one shilling were to be confined to matters falling within art. 13, it is in art. 13 itself that one would have expected to find them. The fact that they do not appear in art. 13 but appear, in quite general language, in art. 14, which is dealing with the general question of whether or not a shareholder is to pay for a certificate, appears to me to be the strongest confirmation of the view which I take of the actual words of art. 14 itself—namely, that they are intended to refer to some class of certificate which has been issued outside the limited case of new certificates under art. 13. If that be right, what further class of certificates can there be to which the words can refer? They clearly in my judgment do not refer to a case where the shareholder, having obtained one block of shares and obtained his free certificate for that, afterwards obtains another block of shares and asks for a free certificate for that. In such a case, the certificate for the second block of shares would, quite clearly, in my judgment, not be a subsequent certificate under art. 14, but would fall within the opening words of art. 14, and the member would be entitled to a certificate gratis for the new block of shares so acquired by him. That is the only other limited scope for the words "subsequent certificate" which could I think be suggested—and to do Mr. Grant justice, it was not he who suggested it, it was one which I think arose during the opening of the case, because when I asked Mr. Grant whether he had an alternative argument to address to the Court on the hypothesis that the words "subsequent certificate" in art. 14 are not to be limited to the certificates issued under art. 13, he indicated quite clearly that he had no such alternative

C. A.
1939
SHARPE
v.
TOPHAMS,
LD.

Sir Wilfrid
Greene M.R.

argument to adduce. In my opinion, the only possible meaning that can be given to art. 14 is the plain meaning of the words as they stand, and a fee of one shilling is to be paid in respect of every subsequent certificate issued, words which contemplate that there may be issues of subsequent certificates not limited to cases falling under art. 13. That fits in exactly with the construction which I have placed upon art. 12, and in my opinion confirms that construction. Now that really disposes of the case. It is a pure question of construction, and I myself find no difficulty about it.

Mr. Grant did submit a further argument, to this effect: that, assuming there is a right in the member to call from time to time for his certificate to be split, that is a right which he is only entitled to exercise to a reasonable extent. That is an argument which I am quite unable to accept. It would involve reading in, by implication, into art. 12 a proviso to that effect. On no canon of construction is it possible in my judgment to read in such a proviso, and I decline to do so.

In the result, the appeal must be allowed, and allowed with costs here and below.

FINLAY L.J. I am entirely of the same opinion, and I do not want to add anything.

LUXMOORE L.J. I also agree.

Appeal allowed.
Leave to appeal to House of Lords refused.

Solicitors: *Kenneth Brown, Baker, Baker, for Evans, Lockett & Co., Liverpool; B. Trayton Kenward, for Radcliffe-Smith, Abercromby & Co., Liverpool.*

H. C. G.

CROSSMAN J.

1938

Nov. 22, 29.

In re DISRAELI AGREEMENT

AND

In re THE AGRICULTURAL HOLDINGS ACT, 1923.

CLEASBY *v.* PARK ESTATE (HUGHENDEN), LIMITED.

[1938. D. 1070.]

Landlord and Tenant—Agricultural holding—Lease of land—Clause enabling landlord to resume possession of a portion of demised land without notice—No compensation payable to tenant—Rent proportionately reduced—Whether clause valid—Tenant's right to compensation—Agricultural Holdings Act, 1923 (13 *&* 14 *Geo.* 5, *c.* 9), *ss.* 12, *sub-s.* 7; 25, *sub-s.* 1; 27, *sub-ss.* 1 *and* 2; 50.

By an agreement made in 1936 D. agreed to let a farm to the plaintiff for two years, the tenancy to continue subject to two years' notice terminating on September 29. The agreement contained a proviso that the landlord could resume possession of any portion of the land so leased in case it was required for building purposes without payment of compensation, but with a proportionate reduction in the rent attributable to the area so taken by the landlord. Shortly after the plaintiff had entered into possession, the reversion in fee simple of D. expectant on the termination of the tenancy of a portion of the demised land became vested in the defendants. In 1938 the defendants gave the plaintiff notice of this and that in accordance with the proviso in the tenancy agreement they would resume possession of a specified portion of the farm. Accordingly they entered, by one of their directors, upon the portion mentioned in the notice.

The plaintiff, having disputed the defendants' right to so resume possession and terminate the tenancy without giving two years' notice to quit, took out an originating summons to determine the questions (1.) whether the defendants were entitled under the proviso in the tenancy agreement or otherwise to determine the tenancy as to any part of the demised premises otherwise than by giving two years' notice in writing, and (2.) whether they were entitled to immediate possession of the premises comprised in their notice:—

Held, (1.) that on the true construction of the proviso in the tenancy agreement no notice was required before possession could be resumed of the part to which the notice related;

but (2.) that the fact that the defendants had actually (when intending to resume possession in pursuance of the proviso) given notice to the plaintiff of such intention, brought s. 27, sub-s. 1, sub-para. (*b*), of the Agricultural Holdings Act, 1923, as to the payment of compensation, into force, notwithstanding the provision to the contrary in the tenancy agreement. The provisions of the Act as to compensation applied therefore as if the part to which the notice related were a separate holding;

(3.) that as the proviso in the tenancy agreement rendered it impossible for the plaintiff to give the month's notice of intention to claim compensation for disturbance required by s. 12, sub-s. 7, para. (*b*), of the Act and thereby indirectly deprived him of the right to compensation for disturbance, the proviso was rendered invalid by virtue of s. 50 of the Act, which avoided contracts entered into by the tenant of a holding purporting to take away from him a right of compensation under the Act.

The answer therefore to both questions to the summons was in the negative.

ADJOURNED SUMMONS.

By an agreement in writing made in October, 1936, between C. R. Disraeli (therein called "the landlord") of the one part and the plaintiff, W. E. B. Cleasby (therein called "the tenant"), of the other part the landlord by clause 1 agreed to let and the tenant agreed to take for a term of two years from September 29, 1936, and unless two years' notice to quit should be given by one of the said parties to the other of them expiring at the end of the said two years then the said tenancy should continue until two years' notice to quit should be given by one of the parties to the other of them expiring on September 29 in any year, the farm known as the Manor Farm in the parish of Hughenden in the county of Bucks. By clause 4, sub-clause 3, it was agreed and declared that the landlord should be entitled to resume possession in case required for building or otherwise of any portion of the demised premises without payment of compensation to the tenant, but with proportionate reduction in the rent of 280*l.* thereby reserved as attributable to the area of the portion of which possession should be so resumed.

The plaintiff entered into possession of Manor Farm on or about September 29, 1936, and had remained in possession ever since on the terms of the agreement. By a deed of conveyance dated February 16, 1938, the reversion in fee simple expectant on the termination of the plaintiff's tenancy in about forty acres forming part of Manor Farm became vested in the defendants, Park Estate (Hughenden), Ld. On February 17, 1938, the defendants gave the plaintiff notice of this deed of conveyance and of the fact that 15*l.*, part of the rent payable by the plaintiff, was apportioned to the part conveyed to the defendants. On February 21, 1938, the solicitors to the defendants sent a notice to the plaintiff in the following terms: "To Mr. William E. B. Cleasby—Manor "Farm, Hughenden, High Wycombe, Bucks—As solicitors and "agents for your landlord Park Estate (Hughenden), Ld., we "hereby give you notice in accordance with clause 4 (3.) of your "tenancy agreement dated in 1936 that your said landlord "forthwith resumes possession of the portion of Manor Farm "Hughenden in the borough of Chepping Wycombe in the "county of Buckingham which has recently been purchased "by your said landlord and which forms part of the land "numbered 37 on the plan annexed to your said tenancy "agreement. Dated, etc. Signed, etc. Address, etc.— "Solicitors and agents for Park Estate (Hughenden), Ld." On March 8, 1938, the defendants, by one of their directors, entered upon the forty acres. By an agreement in writing dated June 17, 1938, it was mutually agreed between the duly authorized agent of the defendants and the plaintiff that the plaintiff held the land on the terms of the tenancy agreement of 1936.

A dispute having arisen as to whether the defendants were entitled to terminate the plaintiff's tenancy and resume possession of the land without giving two years' notice to quit expiring on September 29 in any year, an originating summons was taken out by the plaintiff. The summons, asked for the determination (inter alia) of the questions (1.) Whether or not on the true construction of the said tenancy agreement and having regard to the provisions of the Agricultural Holdings Act, 1923, the defendants were entitled under clause 4, sub-clause 3, of the said tenancy agreement or otherwise to determine the tenancy as to any part of the premises comprised therein otherwise than by giving two years' notice in writing expiring on September 29 in any year to quit such part or how otherwise and for a declaration accordingly; (2.) Whether in the events which had happened the defendants were entitled to immediate possession of the premises comprised in a notice dated February 21, 1938, and given by Messrs. . . . . as solicitors and agents for the defendants to the plaintiff.

J. B. Richardson for the plaintiff. The questions before the Court depend primarily on the construction of clauses 1 and 4, sub-clause 3, of the tenancy agreement. Further, there is of course the question of compensation under the Agricultural Holdings Act, 1923. On the construction of clause 4, sub-clause 3, there is no provision in the sub-clause as to what notice for resuming possession should be given, therefore one has to look at clause 1, which distinctly specifies two years' notice as necessary. In any case a reasonable notice is required. As to the necessity of a notice in the case of an agreement creating a yearly tenancy, see *Lewis* v. *Baker.* (1) Where notice is required, it must at least be a full twelve months' notice expiring at the end of the current year of the tenancy: see s. 25, sub-s. 1, of the Act of 1923 (2); and, if no notice to quit is specified—namely, where there is no express provision as to length of notice, there must be implied a full twelve months. If, on construction of the agreement, s. 25, sub-s. 1, of the Agricultural Holdings Act, 1923, s. 25, does not apply, by reason of sub-s. 2 (2), the compensation provisions of the Act apply as if the part to which the notice relates were a separate holding: see s. 27 of the Act of 1923. (3)

(1) [1906] 2 K. B. 599.

(2) Agricultural Holdings Act, 1923, s. 25, sub-s. 1: "Notwith-"standing any provision in a con-"tract of tenancy to the contrary, "a notice to quit a holding shall "be invalid if it purports to ter-"minate the tenancy before the "expiration of twelve months from "the end of the then current year "of tenancy; . . . ."

Sub-s. 2: "This section shall "not apply to . . . .

"(*c*) Any notice given in pur-"suance of a provision in the "contract of tenancy authoris-"ing the resumption of posses-"sion of the holding or some "part thereof for some specific "purpose . . . ."

(3) Sect. 27, sub-s. 2: "Where "the landlord of a holding gives "notice, in pursuance of a provi-"sion in that behalf contained in "the contract of tenancy, of his "intention to resume possession "of some part of the holding, the "provisions of paragraphs (*b*) and "(*c*) of sub-section (1.) of this "section (but not including the "proviso thereto) shall apply as "if the notice were such a notice

CROSSMAN J.
1938
DISRAELI AGREEMENT AND THE AGRICULTURAL HOLDINGS ACT, 1923, *In re.*
CLEASBY *v.* PARK ESTATE (HUGHENDEN), LD.

If no notice is required by agreement, then it makes it impossible for the tenant to give one month's notice under the Act of 1923, s. 12, sub-s. 7 (*b*) (1); but no contract can be made taking away a tenant's right to compensation: s. 50 of the Act of 1923 (2): see *Cathcart* v. *Chalmers*. (3) There is therefore a provision in the tenancy agreement indirectly excluding the tenant's right to compensation for disturbance, and if, under the agreement, no notice is necessary, it is void under the Act.

Russell Gilbert for the defendants. On the wording of clause 4, sub-clause 3, of the tenancy agreement, the tenant, having entered into the tenancy agreement freely, could, if he had wished, have stipulated for notice to be given by the landlord of resumption of possession. On the true construction of the sub-clause no notice was necessary; resumption of possession could be at any time if the land or a portion of it was required, e.g., for building purposes. Any such act on the part of the landlord is saved by s. 25, sub-s. 2 (*c*), of the Agricultural Holdings Act, 1923; the "specified purpose" in the sub-clause of the sub-section being for building. The sub-clause is valid except so far as it provides that the resumption of possession is to be without payment of compensation. It is only void under s. 50 to that extent.

With regard to the argument on behalf of the plaintiff that clause 4, sub-clause 3, deprives the plaintiff of his right to

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"to quit as is mentioned in that "sub-section."

Sect. 27, sub-s. 1: "Where "a notice to quit is given by the "landlord of a holding to a tenant "from year to year with a view to "the use of land for any of the "following purposes:—(i.) . . . . ". . . .; (*b*) the provisions of "this Act respecting compensation "shall apply as if the part to "which the notice relates were a "separate holding."

(1) Sect. 12 [" Compensation "for Disturbance "], sub-s. 7: "Compensation shall not be pay- "under this section— "(*a*) . . . .; or (*b*) unless the "tenant has, not less than one "month before the termination "of the tenancy, given notice in "writing to the landlord of his "intention to make a claim for "compensation under this section; "or . . . ."

(2) Sect. 50: "Subject to the "provisions of this Act, any con- "tract (whether under seal or not) "made by a tenant of a holding, "by virtue of which his right to "claim compensation under this "Act is taken away or limited, "shall to that extent be void."

(3) [1911] A. C. 246.

compensation because it makes it impossible for him to give notice under s. 12, sub-s. 7 (*b*), and is therefore void under s. 50 (1), one must look at s. 57 (2) of the Act of 1923, where " termination " in relation to a tenancy is defined as meaning "cesser of the contract of tenancy by reason of effluxion of "time, or from any other cause." Here the contract of tenancy will not cease until the whole of the land subject to the tenancy agreement is no longer subject to it: *Swinburne* v. *Andrews* (3) and *In re Arden and Rutter's Arbitration.* (4) If the tenant wishes for compensation, he can claim it up to one month before the termination of the tenancy as regards the rest of the farm. He will not be deprived of his right to compensation unless he neglects to give notice of his claim within that time. This final termination of the tenancy may not be for many years.

J. B. Richardson in reply. Sub-s. 2 of s. 27 of the Act of 1923 is relied on, especially where it refers to para. (*b*) of sub-s. 1 of the section. (5) As to compensation, see s. 12, sub-s. 7 (*b*). (6) The cases cited on behalf of the defendants are not cases of separate tenancies held under one contract of tenancy. [He referred to *Doe* d. *Gardner* v. *Kennard* (7); *Liddy* v. *Kennedy*. (8)] The provision as to separate holdings is relied on. The clause cannot be split up and circumstances that may arise later on taken into account and considered.

Cur. adv. vult.

1938. Nov. 29. CROSSMAN J. This is an originating summons raising a question as to the effect of a clause in a tenancy agreement purporting to entitle the landlord to resume possession in certain events of any portion of the

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(1) See note (2) ante, p. 386.

(2) Sect. 57: " In this Act, "unless the context otherwise "requires,— . . . . ' Termination ' in relation to any tenancy "means the cesser of the contract "of tenancy by reason of effluxion "of time, or from any other "cause."

(3) [1923] 2 K. B. 483.

(4) [1923] 2 K. B. 865.

(5) See note (3) ante, pp. 385-6.

(6) See note (1) ante, p. 386.

(7) (1848) 12 Q. B. 244.

(8) (1871) L. R. 5 H. L. 134, 141, 148.

CROSSMAN J.
1938
Disraeli Agreement and The Agricultural Holdings Act, 1923, *In re.*
Cleasby *v.* Park Estate (Hughenden), Ld.

demised premises without payment of compensation to the tenant, but with proportionate reduction in rent. In October, 1936, an agreement in writing expressed to be made between Coningsby Ralph Disraeli of the one part and the plaintiff to this summons, William Edward Bracebridge Cleasby, of the other part, was signed by the plaintiff, but was never signed by Mr. Disraeli or his successors in title. The agreement was one for the letting by C. R. Disraeli and the taking by the plaintiff, of a farm called the Manor Farm in the parish of Hughenden in the county of Buckingham.

[His Lordship read the material portions of the agreement and stated the facts.]

The plaintiff has contended that the defendants were not entitled to resume possession of the forty acres without giving two years' notice to quit expiring on September 29 in any year. Mr. Richardson, on behalf of the plaintiff, has put forward three contentions. First of all, he argues that on the true construction of clause 4, sub-clause 3, of the tenancy agreement, as the clause does not specify any period of notice on which, or any time at which, possession can be resumed, the notice specified in clause 1 is by implication necessary, and possession can only be resumed upon two years' notice expiring on a September 29. Alternatively Mr. Richardson contends that a reasonable notice is necessary and that a reasonable notice is that required by s. 25 of the Agricultural Holdings Act, 1923—namely, twelve months from the end of the then current year of the tenancy. Finally Mr. Richardson contends that, if on the true construction of clause 4, sub-clause 3, of the tenancy agreement no notice is required before possession can be resumed, the clause is void under s. 50 of the Agricultural Holdings Act, 1923, because, as he contends, the plaintiff's right to compensation under the Act is taken away or limited by virtue of the clause.

Upon the question of the construction of clause 4, sub-clause 3, of the tenancy agreement I cannot accept either of Mr. Richardson's contentions. In my judgment the clause means that, if the landlord requires any part of the premises for building or for any purpose ejusdem generis with building—

as to the words " or otherwise " I would refer to the case of *Johnson* v. *Edgware, etc., Ry. Co.* (1)—he can determine the tenancy as to such part without giving any notice to the tenant and without paying any compensation to the tenant. It seems to me, however, that the words " without payment of compensation " in this clause are clearly affected by s. 50 of the Act of 1923, and it may be that the effect of those words is sufficient by itself to render the whole clause void. But the question which arises is: is any compensation payable under the Act in the present case, or would it be, apart from this clause? is there anything which s. 50 can affect? Sect. 50 of the Act is in the following terms: " Subject to "the provisions of this Act, any contract (whether under seal "or not) made by a tenant of a holding, by virtue of which his "right to claim compensation under this Act is taken away or "limited, shall to that extent be void."

Now the compensation which was dealt with in the first part of the argument in this case was mainly the compensation for disturbance which arises under s. 12 of the Act of 1923. The first question upon which I have to make up my mind is whether any compensation for disturbance is payable under s. 12 when no notice is required. I am considering this question now on the basis of my finding on the construction of the clause that the clause means that no notice is required before possession can be resumed. Can it be said that the tenancy terminates by reason of a notice to quit given by the landlord? Unless it can, s. 12 does not seem to give any right to compensation at all. " Compensation for Disturbance " is the heading of a number of sections beginning at s. 12, which runs in this way: " Where the tenancy of a holding terminates "by reason of a notice to quit given by the landlord, and in "consequence of such notice the tenant quits the holding, then, "unless the tenant . . . ."—various things here follow which I need not deal with—" compensation for the disturbance shall "be payable by the landlord to the tenant in accordance with "the provisions of this section." It seems to me that if my construction of sub-clause 3 of clause 4 of the tenancy agreement is right, no notice to quit is necessary to terminate the tenancy, and under the sub-clause the tenancy may be determined simply by the landlord entering without any previous notice. But then s. 27 of the Act reads as follows, sub-s. 2: "Where the landlord of a holding gives notice, "in pursuance of a provision in that behalf contained in the "contract of tenancy, of his intention to resume possession "of some part of the holding, the provisions of paragraphs (*b*) "and (*c*) of sub-section (1.) of this section (but not including "the proviso thereto) shall apply as if the notice were such a "notice to quit as is mentioned in that sub-section." Para. (*b*) of sub-s. 1 is the one I am concerned with: "the "provisions of this Act respecting compensation shall apply "as if the part to which the notice relates were a separate "holding."

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(1) (1866) 35 Beav. 480.

Now does the fact that no notice is required under sub-clause 3 of clause 4 prevent the case from coming within s. 27, sub-s. 2? In fact here the landlord did give a notice and I think that that is sufficient for the purpose. Sub-s. 2 does not say "Where the landlord is required to give notice" but "Where "the landlord gives notice"—it is true, "in pursuance of a "provision in that behalf contained in the contract of "tenancy," and it refers also to "his intention to resume "possession of some part of the holding." What he did here was to give notice of his intention in pursuance of the provisions of the contract of tenancy to resume possession. I do not find that the giving of notice is necessary, but where the landlord has given notice I think that brings para. (*b*) of sub-s. 1 of s. 27 into force and the provisions of the Act respecting compensation apply "as if the part to which the "notice relates were a separate holding." The result of that is that the position is the same really as if s. 12 had applied. With regard to s. 12, sub-s. 7, Mr. Richardson says that s. 12 provides for the payment of compensation for disturbance by the landlord to the tenant, and sub-s. 7 enacts that "Compensation shall not be payable under this section "(*b*), unless the tenant has, not less than one month before "the termination of the tenancy, given notice in writing

CROSSMAN J.
1938
Disraeli Agreement and The Agricultural Holdings Act, 1923, *In re.*
Cleasby *v.* Park Estate (Hughenden), Ld.

"to the landlord of his intention to make a claim for compensation under this section." Sect. 50 of the Act, to which I have already referred, says: "Subject to the provisions "of this Act, any contract (whether under seal or not) made "by a tenant of a holding, by virtue of which his right to "claim compensation under this Act is taken away or limited, "shall to that extent be void." If, as I have held on the construction of the tenancy agreement, no notice is required before possession can be resumed under clause 4, sub-clause 3, the tenant cannot, in compliance with s.12, sub-s. 7, para. (*b*), give notice in writing to the landlord of his intention to make a claim for compensation under the section not less than one month before the termination of the tenancy, and so he is deprived of his right to compensation. Mr. Richardson's argument is that clause 4, sub-clause 3, of the tenancy agreement takes away or limits the tenant's right to compensation under the Act and is consequently void under s. 50. Mr. Russell Gilbert for the defendants says, in answer to this argument, that by virtue of the definition of " termination " in s. 57 of the Act, the expression " the termination "of the tenancy" in s. 12, sub-s. 7, para. (*b*), means the cesser of the contract of tenancy; and relying upon two cases, *Swinburne* v. *Andrews* (1) and *In re Arden and Rutter* (2), he contends that the contract of tenancy in the present case does not cease until all the land comprised in the tenancy agreement has ceased to be subject to it, and the tenant is not deprived of his right to compensation unless he fails to give notice of his intention to make a claim at least a month before the final termination of the tenancy, which may be many years hence. In reply to this argument, Mr. Richardson relies on s. 27, sub-s. 2, para. (*b*), of the Act, to which I have already referred. Mr. Gilbert says that para. (*b*) of sub-s. 1 of s. 27 means that the part to which the notice relates is to be treated as a separate holding only for the purpose of assessing compensation. But I do not find that in the Act. It seems to me that the provisions of this Act respecting compensation generally are to apply as if the part to which

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(1) [1923] 2 K. B. 483.

(2) [1923] 2 K. B. 865.

CROSSMAN J.
1938
Disraeli Agreement and The Agricultural Holdings Act, 1923, *In re.*
Cleasby *v.* Park Estate (Hughenden), Ld.

the notice relates were a separate holding. In my judgment, as clause 4, sub-clause 3, of the tenancy agreement, if valid, would enable the landlord to determine the tenancy as to part of the demised premises by re-entering without any previous notice, a determination as to part under the clause would affect the determination of the tenancy as to such part within the meaning of s. 12, sub-s. 7, para. (*b*), of the Act, and the tenant would be deprived of his right to compensation by that sub-section; and the clause is, so far as it purports to enable the landlord to determine the tenancy as to part without any previous notice, rendered invalid by s. 50. That renders the whole clause useless for the present purpose, because the landlord cannot make any use of it without giving the full notice required by clause 1 of the agreement.

In my judgment therefore the landlord is not entitled to determine the tenancy under clause 4, sub-clause 3, of the tenancy agreement as to part of the demised premises without giving the notice required by clause 1, and question 1 of the originating summons must be answered in the negative. It follows that question 2 must also be answered in the negative.

Solicitors: *Rutland & Crauford, for Winter-Taylor & Woodward, High Wycombe; Savory, Pryor & Blagden, for Bliss Sons & Covell, High Wycombe.*

A. R. Ll.-T.

THE WESTHOUGHTON COAL AND CANNEL COMPANY, LIMITED *v.* THE WIGAN COAL CORPORATION, LIMITED.

LUXMOORE L.J.

1938

July 13 *to* 15, 18 *to* 22, 26, 27; *Oct.* 13, 14, 17 *to* 19, 24 *to* 28, 31; *Nov.* 1 *to* 4, 7 *to* 11, 14 *to* 17.

1939

Jan. 11.

[1934. W. 2154.]

Mines and minerals—Flooding of mine—Discharge of water through tunnel to pumping pit—Cessation of pumping—Removal of barriers by other parties—Flooding of workings not in existence when tunnel made—No liability for damage caused by escape of water.

A mineowner, who works in a skilful and usual course of mining, is under no liability to the owner of a neighbouring mine, if the water which collects in his mine in the course of his working escapes and flows by natural gravitation into a neighbouring mine, even if the working increases the natural flow of the water. But he will be liable if he conducts the water to the lower mine by means of some opening made or other work executed with the express purpose of so conducting the water and not for the purpose of winning minerals.

Where, either in the course of winning minerals or preparatory to so doing, the flow of water by gravitation is interfered with and the direction of its flow is interfered with by the construction of an artificial channel, by means of which the water is conducted to a place which it would not have reached if the artificial channel had not been made, then, if the conducting of the water through the artificial channel has increased the burden on the owner of the lower mine, the maker of the artificial channel is liable for the damage caused by such increase. If it has not increased the burden to any appreciable extent, no liability will fall on the maker of the artificial channel. The time for the ascertainment of the appreciable increase of the burden on the owner of the lower mine is the time when the artificial channel is constructed. The material circumstances must be those obtaining at that date.

If an artificial channel has been constructed in a mine, the maker of such artificial channel is not liable for all time for damage to another mine, if water should at any time escape down the artificial watercourse into the neighbouring mine, by reason of the acts of the owner of the lower mine, or other parties, done after the construction of the artificial watercourse.

Smith v. *Kenrick* (1849) 7 C. B. 515 and *Baird* v. *Williamson* (1863) 15 C. B. (N. S.) 376 considered.

ACTION.

In these proceedings the plaintiff company claimed from the defendant company a very large sum of money by way of damages for injury alleged to have been caused by the defendants or their predecessors by wrongfully discharging or causing or permitting the discharge of a great quantity of water into a mine which was being worked by the plaintiff company. They alleged that owing to the operations of the defendant company in leading water from other mines to a pumping station of the defendants and the subsequent abandonment of these works by them, serious flooding had resulted to certain of the plaintiff company's mines, causing damage. The defendant company did not admit the plaintiff company's allegations as to damage and they denied their allegation as to any wrongful proceedings by them in permitting water to escape or flow into the plaintiff company's mines.

The only part of the case calling for report relates to the question of the defendant company's legal liability (if any).

The following statement of facts and of the contentions of the parties is taken from the judgment of the learned judge :—

The district in which the mines are situate is known as the South Lancashire coalfield. A large number of seams or mines of coal occur in this field, and for many years past these seams or mines have been worked from a number of pits which have been sunk from time to time by various companies and firms engaged in the coal-mining industry. Speaking generally the more important seams or mines for the purposes of this case are those which are respectively known as the "Cannel," "the King," "The Ravine," "the Yard," "the Bone," and "the Arley Seams." These coal seams are usually met in the order stated as the several geological strata present in the district are traversed in mining operations, but, owing to faults which occur throughout the coalfield, the several seams are in places found in varying relationship.

The plaintiffs were incorporated in the year 1872 to take over and work certain coal seams or mines under a considerable area of land at Westhoughton in the South Lancashire coalfield. After incorporation the plaintiffs from time to time acquired or leased further coal seams or mines in the neighbourhood, and at the date of the issue of the writ in this action the plaintiffs were entitled to work certain seams of coal under an area of land which is shown on the map annexed to the statement of claim and is coloured blue. I will refer to this area hereafter as "the Westhoughton Area." The map referred to is a print of the 1930 edition of the 6-inch Ordnance Survey Lancashire Sheet LXXXVI. S.E. The "Westhoughton," "Bone" and "Ravine" mines and the "King Coal and Cannel" seams referred to in the amendments to the statement of claim are all situate in the Westhoughton Area.

On the north-west side of the Westhoughton Area, and immediately adjoining it, is an area of land coloured green on the same map. The coal in this area was worked before 1892 by two separate concerns which were respectively known as the Scot Lane Coal Company, Ld. (to which I will refer as the "Scot Lane Company"), and the Brinsop Hall Colliery Company. The latter company ceased to exist after 1892, and such coal as was thereafter worked in this area was worked by the Scot Lane Company. I will refer to this green area as "the Scot Lane Area." The Scot Lane Company ceased to work coal in or about 1932 and went into liquidation before this action was instituted. Neither the Scot Lane Company nor its liquidator is a party to this action. On the north-west boundary of the Scot Lane Area there is a further area of land which is coloured yellow on the map. The coal under this yellow area was worked before the year 1886 by a company called the Arley Main Coal Company. This company has throughout the hearing been referred to as "Ridgways" and I propose to continue so to do. No coal has been worked in the yellow area since 1886 except that in the year 1917, in circumstances to which I shall have to refer later, a small portion of the coal in the "Bone" seam under it was worked by the Scot Lane Company. I will refer to this yellow area as the "Ridgway Area." The map shows a smaller area of land coloured pink—adjoining the Scot Lane Area on the south-west side thereof. Coal under this area has been worked by the defendants since their incorporation in 1930.

The defendants are a corporation which was registered on August 1, 1930, in pursuance of an amalgamation scheme approved by the Court of Railway and Canal Commissioners under the provisions of the Mining Industry Act, 1926. One of the companies included in this amalgamation scheme was the Wigan Company. The coal under the whole of the area in which the defendants became entitled to work by reason of the amalgamation scheme had previous thereto been worked by the predecessors in title of the defendants, including the Wigan Company, and it is common ground that the defendants are, by reason of the amalgamation scheme, liable for anything for which their predecessors (including the Wigan Company) would have been liable if the amalgamation had not taken place. It is also common ground that the defendants are not liable for anything which the Scot Lane Company did in the Scot Lane Area, otherwise than at the request of and as agents for the Wigan Company. The area in which the defendants are, by reason of the amalgamation scheme, entitled to work coal, and in which their predecessors (including the Wigan Company) worked coal before the amalgamation, extends over a far larger area than that which is coloured pink on the plan. The whole area extends practically to the Ridgway Area in the north and to the Westhoughton Area in the south-east. I will refer to the whole of the area worked by the defendants and their predecessors in title including the pink area as the "Wigan Area." There are a large number of coal pits in the Wigan Area, some of which were being worked, and others which had ceased to be worked at the times material to be considered in this action. The principal pits in the Wigan Area are the "Meadow," "Gorses," "Wall Hey," "Moor," "Crawford," "California" and "Aspull." A reference to these pits on the map is sufficient to define the Wigan Area for the purposes of this action.

In the year 1871 the Wigan Company entered into an agreement with the Scot Lane Company which provided among other things that the Wigan Company should establish a pumping station in the pink area and permit Scot Lane to discharge water to it from mines in the Scot Lane Area and that the Wigan Company should, in consideration of an annual payment to it by the Scot Lane Company, pump that water to the surface for a term of twenty years from October 1, 1872. This pumping station was duly constructed, and is known as the "Aspull Pumping Pit." After the making of the agreement referred to, an opening was made from the "King and Cannel" seams in the Scot Lane Area so that the water flowed freely from the "King and Cannel" seams of the Scot Lane Company to the "Aspull Pumping Pit." The term of the agreement was from time to time extended, and the agreement remained in force until August 11, 1932. No claim is made in this action by reason of this agreement or anything done thereunder. In the year 1886 the Wigan Company acquired from the Ridgway Company a pumping station situate in the Ridgway Area, which is known as the "Ridgway Pumping Pit." At this date the working in the "King" and "Arley" seams or mines in the Ridgway Area had ceased, the coal in these seams having been worked out. No other coal was then being worked, or has since been worked in the Ridgway Area. At the date when the Wigan Company acquired the "Ridgway Pumping Pit," no pumping was being done there. After the acquisition of the "Ridgway Pumping Pit" the Wigan Company pumped the water from the Ridgway mines from that pit until the month of May, 1887. In or about the year 1886, the Wigan Company procured the Scot Lane Company as agents for the Wigan Company to make an opening in the Ridgway "King Coal" seam for the purpose of discharging water from the Ridgway Area into the Scot Lane Area and to construct a road through the Scot Lane Area so that the water from the "King Coal" and "Arley" mines in the Ridgway Area might flow through such road into a road joining a pit in the Scot Lane Area known as "Scot Lane No. 4" to the "Aspull Pumping Pit," and be pumped from that pit to the surface, together with the water coming from the Scot Lane Area, which was being

LUXMOORE L.J.
1938
THE WESTHOUGHTON COAL AND CANNEL CO.
v.
THE WIGAN COAL CORPORATION.

dealt with under the 1871 agreement. The opening made by the Scot Lane Company from the Ridgway Area is shown on the plan referred to at the trial as " King Coal No. 1 " ; it was throughout the trial referred to as " Tunnel No. 1 (b) " ; it discharged water from the Ridgway Area into a pit known as " Scot Lane Pit No. 1," which was connected with two other pits, known as " Scot Lane Nos. 2 and 5 " respectively. The water road constructed by the Scot Lane Company in the circumstances mentioned ran from " Scot Lane Pit No. 5 " to a road near the " Scot Lane No. 4 Pit," and thence into the road connecting that pit with the "Aspull Pumping Pit." The water road constructed by the Scot Lane Company was referred to during the trial as the " King Coal Water Road," and I will continue so to call it. From 1887 until August 11, 1932, the Wigan Company, and, after the amalgamation, the defendants, pumped water at the " Aspull Pumping Pit." Included in the water pumped at that pit was the water flowing from the Ridgway Area through "Tunnel No. 1 (b) " to the " King Coal Water Road," and from thence into the road from " Scot Lane Pit No. 4 " to the " Aspull Pumping Pit," and the water coming from the Scot Lane Area collected at " Scot Lane Pit No. 4," which was connected with the " Scot Lane Pits Nos. 1, 2 and 5." The defendants ceased to pump water at the " Aspull Pumping Pit " on August 11, 1932.

The plaintiffs' case is that by reason of the stoppage of pumping at the " Aspull Pumping Pit," the water flowing from the Ridgway Area through " Tunnel No. 1 (b) " accumulated either with or without other water made in or coming to the Scot Lane Mines and rose in those mines until one year later, namely on August 11, 1933, it reached a level which enabled it to flow into the plaintiffs' Westhoughton Bone Mine in such quantities that they were unable to dispose of it by means of their own pumping machinery and were on March 16, 1934, forced to abandon the working of their Westhoughton Bone Mine. The plaintiffs claim that the water which came from the Ridgway Area through " Tunnel No. 1 (b) " was led to their Bone Mine by reason of the construction of "Tunnel No. 1 (b)." They further say that the tunnel was not made in the proper or usual course of mining or for the purpose of obtaining coal but for the convenience of the Wigan Company. The plaintiffs contend that, if it is established that the water from the Ridgway Area was conducted into the Scot Lane Area by an artificial watercourse, all that it is necessary for them to prove, in order to establish their claim against the defendants, is that such water reached the Westhoughton Bone Mine after the pumping at the "Aspull Pumping Pit" ceased.

The defendants challenge this proposition and say that even if it had been proved (which they deny) that water from the Ridgway Area reached the plaintiffs' Westhoughton Bone Mine, they are under no liability in law, unless the plaintiffs also prove that the water from Ridgway Area was brought through the " Ridgway Tunnel No. 1 (b)" with the express purpose of turning it into the plaintiffs' mines. The defendants say that it is impossible for the plaintiffs to establish any such purpose, because at the date when " Tunnel No. 1 (b)" was constructed, the plaintiffs were not in fact working their Westhoughton Bone Coal, and that at that date there was no possibility of the existence of any such purpose, because there were then no workings in the Scot Lane Bone Mine or the Westhoughton Bone Mine, which adjoins the last mentioned mine, into or through which the water from the Ridgway Scot Lane or Wigan Areas could be turned so as to flow into the Westhoughton Bone Mine. The defendants also say that if their first contention is wrong, " Tunnel No. 1 (b)" was constructed in the proper and usual course of mining and in order to enable the Wigan Company to win the coal in their own mines with safety, and that on this ground also they are under no liability to the plaintiffs. The defendants further say that the plaintiffs have failed to discharge the onus which is on them of proving that any of the water which eventually flooded the Westhoughton Bone Mine came from the Ridgway Area via the "Tunnel No. 1 (b)." Finally the defendants say that even if, contrary to their contention, the plaintiffs have discharged the onus of proving that the

Westhoughton Bone Mine was flooded by water coming either wholly or in part from the Ridgway Area, via "Tunnel No. 1 (b)," they are in law under no liability for any damage caused thereby because any water coming from the Ridgway Area must inevitably have reached the Westhoughton Bone Mine by means other than "Tunnel No. 1 (b)."

Sir William Jowitt K.C., K. E. Shelley K.C., Hon. H. Fletcher Moulton and *W. J. Kenneth Diplock* for the plaintiffs. On the question of flooding, an unreported case mentioned in Halsbury's Laws of England, 2nd ed., vol. 22, at p. 679, n. (*g*), before Farwell J., and affirmed by the Court of Appeal, namely, *Lockwood & Elliott* v. *W. & J. Cardwell, Ld.*, is in point. This case seems to cover the only point of law before the Court.

It is submitted that the proposition of law applicable to the case now before the Court is that a person mining a coal-mine is obliged prima facie not to allow the water from his mine to escape, but, if water does escape and finds its way into his neighbour's mine, then (notwithstanding that prima facie presumption) the neighbour cannot complain if the water finds its way there by natural gravitation. For this purpose gravitation is deemed to be natural gravitation, if the water runs down workings which have been made with a view to winning coal in the normal and proper method of working. If water is conveyed in artificial channels or passages which were not constructed for the purpose of winning coal, but for the purpose of waterways, then, no matter how proper or prudent it may have been or whatever the motive may have been in constructing these artificial waterways, there is an absolute liability if the water so conducted finds its way into the neighbour's mine. If a coal-owner desires simply and solely to work the coal, and if the likely consequence of so working would be to cause him and his neighbour damage, he is not entitled to do so and can be restrained by an injunction. If he does so and water from the worked mine damages the neighbour's mine, there would be a right of action against him. If there is no danger to the owner working the coal, the owner of the imperilled mine probably could not get an injunction or damages: see *Smith* v. *Kenrick* (1), *Baird* v. *Williamson* (2), where it was laid down that the owner cannot by pumping or as an active agent send water from his own mine into an adjoining mine; *Westminster and Brymbo Coal and Coke Co.* v. *Clayton* (3), where water was artificially conducted; *Rylands* v. *Fletcher* (4); *Lomax* v. *Stott* (5), which, it is submitted, is an illustration of the fact that artificial means must not be used; it must be by natural gravitation by natural processes: *Crompton* v. *Lea*. (6)

A principle can be deduced from the unreported case of *Lockwood & Elliott, Ld.* v. *Cardwell, Ld.*, when the hearing was before Farwell J., where he refers to artificial channels, and the proposition deduced, it is submitted, from this and other cases is that if an artificial channel is being made, not for the purpose of winning coal but to convey water, even though it is a perfectly good and reasonable thing to do, and there is no sinister motive or desire to injure another, yet, in fact, if by means of that channel water is conveyed to a neighbour's mine, the maker of the channel is absolutely responsible. The reason is (1.) an artificial channel is being used and (2.) the artificial channel was, ex hypothesi, not constructed for the purpose of winning coal.

[Reference was made to *Davis* v. *Garrett*. (7)]

The damage claimed here arises from the construction by the defendants of these artificial channels for the purpose of conveying water from mine A into mine B, which mine adjoins the plaintiffs' mine.

Hon. Sir Stafford Cripps K.C., *Charles Harman K.C.*, *Wilfrid Hunt* and *G. Granville Slack* for the defendants. In the set of circumstances deduced from the evidence before the Court, it is submitted, there can in law be no liability upon the defendants. The proposition deducible from the cases is that every mineowner is liable to the common danger of water

(1) (1849) 7 C. B. 515, 564.
(2) (1863) 15 C. B. (N. S.) 376, 390, 391.
(3) (1867) 36 L.J. (Ch.) 476, 478.
(4) (1868) L. R. 3 H. L. 330.
(5) (1870) 39 L. J. (Ch.) 834.
(6) (1874) L. R. 19 Eq. 115, 118, 123, 129.
(7) (1830) 6 Bing. 716, 724.

following the natural laws of gravitation underground, and an owner cannot complain if water under the influence of such natural forces makes its way into his mine. But a neighbouring owner must not move the water by unnatural means so as to cause it to flow on to his neighbour's land. But nothing that is done in the ordinary course of good mining is "unnatural means," unless water is thereby raised artificially by mechanical means to a higher level in the ground, and the essence of the wrong which can be complained of is that the mineowner had it as his purpose to turn the water on to his neighbour's land. Therefore one has to consider the date of the making of the tunnel, because at that moment the purpose for which the tunnel was made is judged.

The case of *Smith* v. *Kenrick* (1), which was cited on behalf of the plaintiffs, must be carefully considered: see the portion of the facts (2) and the remarks of Cresswell J. (3): "The next "ground upon which it was contended, etc." (various portions of the learned judge's judgment were read). Another case relied on by the plaintiffs was *Baird* v. *Williamson* (4), see the remarks of Erle C.J. (5): "One complaint of the plaintiffs "was of this water, etc." See also the case of *Lomax* v. *Stott.* (6) The reasoning and basis in that case is that if you pump your water and give it as it were an artificial level so that it can run into your neighbour's land, that is one thing; but if by ordinary natural gravitation through mining works properly made it happens to get there, it is a very different thing. See also the case of *Crompton* v. *Lea* (7) for the remarks of the Vice-Chancellor in his judgment; and *John Young & Co.* v. *The Bankier Distillery Co.* (8) for the remarks of Lord Watson and Lord Shand.

[Reference also was made to the unreported case of *Lockwood & Elliott, Ld.* v. *W. & J. Cardwell, Ld.*, for Farwell J.'s judgment.]

In the case now before the Court the dates have to be

(1) 7 C. B. 515, 541, 542, 543, 561–566.
(2) Ibid. 541.
(3) Ibid. 561.
(4) 15 C. B. (N. S.) 376, 378, 381, 383, 385.
(5) 15 C. B. (N. S.) 390–392.
(6) 39 L. J. (Ch.) 834, 836.
(7) L. R. 19 Eq. 115, 123, 125.
(8) [1893] A. C. 691, 697, 701.

considered. In 1886, when the tunnel was constructed, there was no conceivable possibility of the water getting on to the plaintiffs' land. Subsequently three acts had necessarily to be done by other people before by any possibility water could have got on to the plaintiffs' land. The defendants cannot be fixed with liability. The long period of time since the building of the tunnel negatives the possibility of the case here being one where the purpose of the defendants was to take water on to the plaintiffs' land.

[Reference was also made to *West Cumberland Iron and Steel Co.* v. *Kenyon.* (1)]

Sir William Jowitt K.C. in reply. The cases cited establish, it is submitted, the proposition that if A B for his own convenience conducts water on to a part of his land by means of a tunnel, not made for the purpose of winning coal, he is responsible for the consequences if that water escapes and no matter when it escapes, it may be a hundred years hence. [He referred again to *Smith* v. *Kenrick* (2) for the remarks of Cresswell J. in his judgment (3) beginning " the act not being "done, etc.": *Baird* v. *Williamson.* (4)] If a man makes anything in the nature of an artificial conduit for water, then, whatever the motive, if that water flows on to a neighbour's land, the neighbour can complain; that is, if he makes a channel so as to make the water flow by some route which it would not flow in by reason of the natural percolation through workings, he is responsible: see the remarks of Erle C.J. (5) and in his judgment. (6)

[He referred to *Rylands* v. *Fletcher* (7) for the remarks of Lord Cairns L.C., and *West Cumberland Iron and Steel Co.* v. *Kenyon.* (8)]

Two conflicting interests have to be harmonized; a man has no right to interfere with the natural gravitational flow of water, and, if he does so interfere, he is liable if it injures his neighbour at any time, however worthy his motives in

(1) (1879) 11 Ch. D. 782.

(2) 7 C. B. 515, 562, 563, 564, 565.

(3) Ibid. 566.

(4) 15 C. B. (N. S.) 376, 388, 389, 390, 391.

(5) 15 C. B. (N. S.) 388.

(6) Ibid. 389.

(7) L. R. 3 H. L. 330, 339, 340.

(8) 11 Ch. D. 782, 786, 787, 790.

LUXMOORE L.J.
1938
THE WEST-HOUGHTON COAL AND CANNEL CO. v. THE WIGAN COAL CORPORATION.

working his mine; unless he can show that the neighbour deliberately and with full knowledge of the facts brought the injury upon himself.

Cur. adv. vult.

1939. Jan. 11. LUXMOORE L.J. The Westhoughton Coal and Cannel Company, Ld. (hereinafter called "the plaintiffs"), instituted this action against the Wigan Coal Corporation, Ld. (hereinafter called "the defendants"), on July 14, 1934, claiming damages for injury alleged to have been caused by the defendants or their predecessors in title, the Wigan Coal and Iron Company, Ld. (hereinafter called "the Wigan Company"), by the flooding of a mine worked by the plaintiffs, known as the "Westhoughton Bone Mine," by the discharge of water into that mine on and after August 11, 1933. Nearly three years later the plaintiffs amended their statement of claim pursuant to an order dated May 4, 1937, made by Simonds J. The object of the amendments was to enlarge the plaintiffs' claim for damages by adding further claims in respect of the alleged flooding of another mine worked by the plaintiffs known as the "Westhoughton Ravine Mine," by the discharge of water into that mine on or after November 13, 1936, and also by the alleged flooding of two further seams of coal, known respectively as the "King Coal" and the "Cannel Seams," belonging to or leased by the plaintiffs and situate at higher levels than the "Westhoughton Ravine Mine." It is common ground that the "Westhoughton Bone and Ravine Mines" have been flooded; that the working of the "Westhoughton Bone Mine" was abandoned by the plaintiffs on March 23, 1934, and that the working of the "Westhoughton Ravine Mine" stopped in the month of May, 1937.

For the purpose of appreciating the plaintiffs' claims against the defendants, I will state certain facts which are not in dispute.

[His Lordship read the facts as set out above and stated the contentions of the parties.]

These are the various questions which fall to be determined.

In stating them I have omitted any reference to the plaintiffs' claims with regard to the Westhoughton Ravine Mine or the Westhoughton King Coal and Cannel Seams, because, if these claims are open to the plaintiffs on the pleading and on the available evidence, the same considerations and arguments in support of the claims advanced in respect of the Westhoughton Bone Mine apply also to the plaintiffs' claims in respect of the Westhoughton Ravine Mine and the seams in question.

I propose to deal with the claims in respect of the Westhoughton Ravine Mine and the seams in question after I have disposed of the questions formulated with regard to the Westhoughton Bone Mine.

Before dealing specifically with the questions I have enunciated it will be convenient if I state what I conceive to be the law with regard to liability for damage caused by water flowing from a higher mine to a lower mine. It is well settled that a mineowner is entitled to get all the minerals in his own mine, and, provided he works in a skilful and usual course of mining, he will be under no liability to any owner of a mine to the dip of his mine if the water which collects in his mine in the course of his working escapes and flows by gravitation to the lower mine or mines; and this is so even if the natural flow of the water be increased by the working. But the mineowner will be liable if he conducts the water from his mine to the lower mine or mines by means of some opening made or other work executed with the express purpose of so conducting the water and not for the purpose of getting minerals: see *Smith* v. *Kenrick* (1); *Baird* v. *Williamson.* (2) It is a question of fact whether a particular work has been executed for the purpose of getting the minerals or for the purpose of conducting the water from a particular mine into the lower mine or mines. If for example a mineowner under cloak of winning minerals works in an unusual and unminerlike manner in order to turn water from his mine into the lower mine or mines, he will be liable for any damage caused by his working. A good illustration of this class of case is to be found in the case of *Lockwood & Elliott*

(1) 7 C. B. 515.

(2) 15 C. B. (N. S.) 376.

v. *W. & J. Cardwell, Ld.*, decided by Farwell J. on July 13, 1934. This decision was subsequently affirmed by the Court of Appeal. The case is not reported, but my attention was called to shorthand notes of the decisions in both Courts. None of the decisions to which I have referred covers in express terms the case where, either in the course of winning minerals or preparatory to so doing, the flow of water by gravitation is interfered with and the direction of its flow is altered by the construction of an artificial channel by means of which the water is conducted to a place which it would not have reached if the artificial channel had not been made. The answer to the question whether the construction of the artificial channel in such circumstances renders the maker of it liable to the owner of the lower mine appears to me to depend on the result of its construction, the material question being : Has the conducting of the water through the artificial channel increased the burden on the owner of the lower mine or not ? If it has, the maker of the artificial channel is liable for the damage caused by such increase; if it has not increased the burden to any appreciable extent, then there is no liability. The time when the question whether there is such an appreciable increase of the burden on the adjoining mine-owner with regard to water falls to be considered, must in my opinion be the time when the artificial watercourse is constructed and the material circumstances must be those obtaining at that date.

I am unable to accept the argument put forward on behalf of the plaintiffs that once an artificial watercourse is made in a mine, its maker is for all time liable for any damage done to another mine by reason of the future escape of water flowing down the artificial watercourse into the other mine, no matter from whose action the escape results. The plaintiffs' case is that the water from the Ridgway Area reached their Westhoughton Bone Mine through "Tunnel No. 1 (b)" reaching the workings in the Scot Lane Bone Mine on the east side of the fault shown on the Bone No. 1 Map by means of a tunnel known as "Tunnel No. 10," and flowing through the workings in the Scot Lane Bone Mine into the workings of the plaintiffs' Westhoughton Bone Mine, which were connected by reason of the fact that the coal on the adjoining boundaries of the two mines had been worked out and there were several places in which actual breaks through from one mine to the other had taken place. These points are shown on the Bone No. 1 Map.

For the purpose of considering the question of the defendants' legal liability I will assume that the plaintiffs' contention as to the source and course of the water is correct. It is common ground that Tunnel No. 10 was not constructed until long after 1886, when "Tunnel No. 1 (b)" was made, and that the Scot Lane Bone Coal into which Tunnel No. 10 leads was not worked out until the year 1932, while the barrier between the Scot Lane Bone Coal and the Westhoughton Bone Coal was not removed until 1931 or 1932. From these facts it is plain that "Tunnel No. 1 (b)" was not constructed with the deliberate purpose of turning the water from the Ridgway Area into the plaintiffs' Westhoughton Bone Mine, for at the date when that tunnel was constructed, there was no possibility of the water from the Ridgway Area reaching the Westhoughton Bone Mine, for that mine was not then being worked, and there was no opening between it and any mine under either the Scot Lane Area or the Wigan Area. It is plain, however, that the "Tunnel No. 1 (b)" was constructed for the purpose of taking water from the Ridgway Area to the Scot Lane Area and through that area to the Wigan Area in order that it might be dealt with at the Aspull Pumping Pit together with the other water from the Scot Lane Area and the Wigan Area respectively, and that "Tunnel No. 1 (b)" is from that point of view an artificial watercourse which interfered with the natural flow of the water carried through it; for, if "Tunnel No. 1 (b)" had not been constructed, the Ridgway water could not have flowed down it. But, as I have already said, this fact is not by itself sufficient to establish any liability on the part of the defendants, if it can be shown that the making of these artificial water roads did not increase the burden to which the plaintiffs were subject, if the artificial channels had not been made. When the "Tunnel No. 1 (b)" was constructed there was, as I have already stated, no connection between the mine under the Scot Lane Area to which it conducted water and the Scot Lane Mine under the same area but on the east side of the fault which I have already mentioned; nor was there any connection between the last mentioned Scot Lane Bone Mine and the Westhoughton Bone Mine. It seems to me impossible in those circumstances to hold that the making of the "Tunnel No. 1 (b)" increased the burden on the plaintiffs in respect of their Westhoughton Bone Mine, and this becomes abundantly plain when it is remembered that on the facts (which I assume to be accurate for the purpose of considering the question of the defendants' legal liability), the water from the Ridgway Area would not have reached the plaintiffs' Westhoughton Bone Mine unless Tunnel No. 10 had been constructed and the coal barriers in the Scot Lane and Westhoughton Bone Mine respectively had been removed and the two mines connected. In no circumstances can the defendants be responsible for the construction of Tunnel No. 10 or for the removal by the Scot Lane Company of the coal barrier on their side of the boundary between the Scot Lane Mine and the Westhoughton Bone Mine, for neither the defendants nor any predecessor for whose acts they are liable had any control over the Scot Lane Company in respect of these matters, and the defendants can therefore be under no liability in respect of either of these acts. But, even if they were responsible for them, they could not be responsible for the removal by the plaintiffs themselves of the coal barrier on the Westhoughton side of the said boundary.

In the result I have come to the conclusion that, assuming for this purpose that the water which flooded the Westhoughton Bone Mine in fact came from the Ridgway Area, the defendants cannot in law be liable for any damage thereby caused to the plaintiffs.

This is sufficient to dispose of the case and to entitle the defendants to have the action dismissed, for what I have said with regard to the Westhoughton Bone Mine must of necessity apply with equal force to the Westhoughton Ravine Mine and the Westhoughton King Coal and Cannel Seams.

LUXMOORE L.J.

1939

THE WEST-HOUGHTON COAL AND CANNEL CO. *v.* THE WIGAN COAL CORPORATION.

But as the case may go further and I heard a considerable body of evidence—this case has occupied thirty-four full working days—it seems to me to be desirable in the interests of every one concerned that I should state my conclusions with regard to certain facts which were in dispute.

His Lordship then dealt with the facts which do not call for report. On these facts he found in favour of the defendant company. He therefore dismissed the action with costs.

Solicitors: *W. P. Ellen, for Peace & Darlington, Liverpool; Gregory, Rowcliffe & Co., for Grundy, Kershaw, Farrar & Co., Manchester.*

A. R. LL.-T.

CROSSMAN J.

1939

Feb. 15, 27.

In re GORHAM'S CHARITY GIFT

AND

In re THE MORTMAIN AND CHARITABLE USES ACT, 1891.

[1938. G. 1399.]

Charity—Will—Devise of residuary real estate for the benefit of the public—Scheme—Order vesting part of land in Official Trustee of Charity Lands—Executors not to assent to devise of another portion without leave of judge—Subsequent order giving leave to assent to devise in favour of Official Trustee of Charity Lands—Desire by trustees of charity to retain land unsold for period of years—Jurisdiction of Court to postpone sale—Mortmain and Charitable Uses Act, 1891 (54 *&* 55 *Vict. c.* 73), *ss.* 5, 6 *and* 8—*Administration of Estates Act,* 1925 (15 *Geo.* 5, *c.* 23), *s.* 36, *sub-s.* 2.

A testator having by his will devised his residuary real estate to charitable uses, a scheme for the administration of the trusts of the estate by the trustees was settled by order of the judge, and it was ordered that the personal representatives of the testator should not assent to the devise of a part of the residuary real estate without the leave of the judge. Several years after the death of the testator an order was made giving liberty to the personal representatives to assent to the devise of this particular portion of the real estate, and they subsequently assented to the devise, whereupon the land became vested in the Official Trustee of Charity Lands.

It being desired to retain this particular part of the real estate unsold for a period of years, the personal representatives applied to the Court for an order to extend the time limited for sale, notwithstanding the length of time after the testator's death and that the land had become vested in the Official Trustee of Charity Lands :—

Held, that on the construction of ss. 5 and 6 of the Mortmain and Charitable Uses Act, 1891, the Court had jurisdiction to extend the time for sale, notwithstanding that the land had become vested in the Official Trustee of Charity Lands under s. 6 of the Act.

In re Ryland [1903] 1 Ch. 467, 474, referred to for the remarks of Byrne J.

ORIGINATING SUMMONS.

This was an originating summons taken out on June 30, 1938, by the trustees of a charity known as Gorham's Gift, established by a scheme dated December 10, 1935, approved by an order of Clauson J., that the time limited by s. 5 of the Mortmain and Charitable Uses Act, 1891, for the sale of certain lands and hereditaments known as "The Paddocks," Rottingdean, in the county of Sussex, forming part of the residuary estate of one Ambrose Gorham, which had been devised by his will to the Corporation of Brighton upon certain trusts, which had been held by the judge to be charitable, might be extended for at least five years from the date of the order to be made thereon or for such further period as the Court might think fit.

By his will dated December 9, 1929, Ambrose Gorham (hereinafter called " the testator "), late of Telscombe, in the county of Sussex, devised and bequeathed by clause 9 thereof his residuary estate, which included certain property known as " the Telscombe property," near Rottingdean, Sussex, to the Corporation of Brighton upon certain trusts, the general effect of which was that " the Telscombe property " should be preserved for the benefit of the public in perpetuity. The testator died on June 30, 1933, and his will was proved on September 6, 1933, in the Principal Probate Registry by his two executors.

By an order of Clauson J. dated December 10, 1935, a scheme was approved for the administration of the trusts of the residuary real estate of the testator which were held by the judge to be charitable, and for the establishment of the charity known as Gorham's Gift. The scheme so approved provided generally that " the Telscombe property " should be preserved for the benefit of the public in perpetuity in accordance with the testator's wishes, and it was ordered (inter alia) that this particular property should vest in the Official Trustee of Charity Lands. It was also further ordered that the executors of the will (the plaintiffs to the summons asking for the said order) should not assent to the devise of any of the remaining part of the residuary real estate of the testator without leave of the judge.

Part of this remaining portion of the testator's residuary real estate was a property known as " The Paddocks," also at Rottingdean. Though this property, " The Paddocks," properly came under s. 5 of the Mortmain and Charitable

CROSSMAN J.
1939
Gorham's Charity Gift and The Mortmain and Charitable Uses Act, 1891, *In re.*

Uses Act, 1891 (1), which required a sale of real estate which had been assured by will to or for the benefit of any charitable use within twelve months from the death of the testator, yet in the circumstances, by the effect of the Administration of Estates Act, 1925, the land vested on the testator's death in his personal representatives; and until they had assented to the devise of the land for charitable purposes, the devise could not take effect. (1)

On July 29, 1938, upon an application by summons by the executors of the will, an order was made by the master in chambers that they should be at liberty to assent to the devise in clause 9 of the will of all the residuary real estate of the testator in favour of the Official Trustee of Charity Lands (other than and except " the Telscombe property," already vested in the Official Trustee of Charity Lands). On December 7, 1938, the personal representatives assented to the devise pursuant to this order, the result of such assent being that " The Paddocks " became vested in the Official Trustee of Charity Lands by virtue of the Administration of Estates Act, 1925, s. 36, sub-s. 2 (2), and the Mortmain and Charitable Uses Act, 1891, s. 6. (3)

The question then arose as to the effect of s. 5 of the Mortmain and Charitable Uses Act, 1891. (1)

The trustees of the charitable trusts of the will, having taken the view that it was not desirable to sell " The Paddocks " at the present time because—though not part of the property required for the actual occupation of the charity—in their view it was likely to increase considerably in value in the future, and, if sold immediately, would not have left the trustees with a sufficient income to keep up the various payments provided by the scheme, had taken out the originating summons above mentioned on June 30, 1938. The matter came before Simonds J. on December 19, 1938, and was adjourned into Court. The respondents were the Official Trustee of Charity Lands and the Attorney-General. The question for determination was whether, in these circumstances, the Court had jurisdiction to extend the time within s. 5. (1)

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(1) Mortmain and Charitable Uses Act, 1891, s. 5: " Land may "be assured by will to or for the "benefit of any charitable use, "but, except as hereinafter pro- "vided, such land shall, notwithstanding anything in the will "contained to the contrary, be "sold within one year from the "death of the testator, or such "extended period as may be deter- "mined by the High Court, or "any judge thereof sitting at "chambers, or by the Charity "Commissioners."

(2) Administration of Estates Act, 1925, s. 36, sub-s. 1: " A "personal representative may "assent to the vesting, in any "person who (whether . . . .) "may be entitled thereto, either "beneficially or . . . ."

Sub-s. 2: " The assent shall "operate to vest in that person "the estate or interest to which "the assent relates, and, unless a "contrary intention appears, the "assent shall relate back to the "death of the deceased."

(3) Mortmain and Charitable Uses Act, 1891, s. 6: "So soon as "the time limited for the sale of "any lands under any such assur- "ance shall have expired without

Raymond Jennings for the applicants, the trustees of the charity. The question is really one of the jurisdiction of the Court—namely, whether the land now sought to be retained unsold for a few years need be sold at the present time. The land has now become vested by the assent of the personal representatives of the testator in the Official Trustee of Charity Lands, and a question like this has never been previously decided by the Courts. The effect of the Administration of Estates Act, 1925, must be considered : see a Practice Note in W. N. [1939], p. 31.

[He referred to Tudor on Charities, 5th ed., at p. 456.]

The only case remotely touching upon the question now before the Court was one before Byrne J., namely, *In re Ryland* (2), where the point was raised but not decided.

[His further argument is referred to in the judgment of the learned judge.]

A. Andrewes Uthwatt for the respondents, the Attorney-General and the Official Trustee of Charity Lands. The application under s. 5 must be made within the period allowed

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"completion of the sale of the "land, the land unsold shall vest "forthwith in the official trustee "of charity lands, and the Charity "Commissioners shall take all "necessary steps for the sale or "completion of the sale of such "land to be effected with all "reasonable speed by the admin-"istering trustees for the time "being thereof, and for this "purpose . . . ."

(1) See note (1) on p. 412.

(2) [1903] 1 Ch. 467.

by the Act. Otherwise there is no jurisdiction to extend the time further. As soon as s. 6 comes into force, the vesting in the Official Trustee of Charity Lands and the duty of the Charity Commissioners arise immediately; a sale must therefore be ordered. The jurisdiction in the Court therefore to prevent an immediate sale cannot arise, and an order for postponement cannot be made.

Raymond Jennings in reply.

CROSSMAN J. This is an originating summons taken out by the trustees of a charity known as Gorham's Gift, to which the Official Trustee of Charity Lands and the Attorney-General are respondents, in which they ask that the time limited by s. 5 of the Mortmain and Charitable Uses Act, 1891, for the sale of the lands and hereditaments known as " The Paddocks," Rottingdean, in the county of Sussex, may be extended for at least five years from the date of the order to be made herein, and for such further period as the Court may think fit.

The circumstances in which this summons is issued are as follows :—

[His Lordship stated the facts.]

The result of s. 5 of the Mortmain and Charitable Uses Act, 1891, which is the section referred to in the summons, would have been that on the expiration of twelve months from the testator's death, the real estate which he devised for these charitable purposes—because they were duly held by Clauson J. to be charitable—would have had to be sold, notwithstanding anything in the will contained to the contrary. As a matter of fact, owing to the effect in this case of the Administration of Estates Act, 1925, the land vested on the death of the testator in his personal representatives, and, until they assented to the devise of the land for charitable purposes, the position was that s. 5 did not come into effect at all. That has recently been pointed out in a Practice Note which was inserted in the Weekly Notes (1) in consequence of a case which came before Bennett J., in which he, following a decision of Eve J. in an unreported case, *In re Bottle* [1929.

(1) [1939] W. N. 31.

B. 1729], in or about the year 1929, held that land within the meaning of the Mortmain and Charitable Uses Act, 1891, remained vested, notwithstanding that a year from the death of the testator had expired, in the personal representative of the testator until he assented in writing to the property vesting in the Official Trustee of Charity Lands. Consequently, no vesting took place under this section, which I will read in a moment, until the personal representatives of the testator had assented to the devise.

Sect. 5 of the Act of 1891 is as follows: "Land may be "assured by will to or for the benefit of any charitable use," as Mr. Andrewes Uthwatt has pointed out, previous to that land could not be devised to charity at all; a gift by will to charity of land was simply void; then the section goes on: "but, except as hereinafter provided, such land shall, notwith-"standing anything in the will contained to the contrary, be "sold within one year from the death of the testator, or such "extended period as may be determined by the High Court, "or any judge thereof sitting at chambers, or by the Charity "Commissioners." Then the next following section, s. 6, is to this effect: "So soon as the time limited for the sale of "any lands under any such assurance shall have expired "without completion of the sale of the land, the land unsold "shall vest forthwith in the official trustee of charity lands, "and the Charity Commissioners shall take all necessary steps "for the sale or completion of the sale of such land to be "effected with all reasonable speed by the administering "trustees for the time being thereof, ..." Then there are directions as to the carrying out of the sale and what steps are to be taken by the Charity Commissioners if the trustees do not act in accordance with the section. The only other section which I think might be thought to bear upon the question which I have to decide is s. 8, which provides: "It shall be lawful for the High Court, or any judge thereof "sitting at chambers, or for the Charity Commissioners, if "satisfied that land assured by will to or for the benefit of "any charitable use, or proposed to be purchased out of "personal estate by will directed to be laid out in the purchase "of land, is required for actual occupation for the purposes "of the charity and not as an investment, by order to sanction "the retention or acquisition, as the case may be, of such "land."

On December 10, 1935, an order was made approving the scheme under which this charity is at present administered. I observe that in that order, which was made by Clauson J., as he then was, there is this provision: "And it is ordered "that the plaintiffs do not assent to the devise of any of "the remaining part of the residuary real estate of the "testator without the leave of the judge." That followed upon the order with regard to "the Telscombe property," which was the property which was to be retained permanently and the property which was to be used for the public use in perpetuity for the inhabitants of Brighton, the property other than that which is referred to as "the remaining part of the "residuary real estate of the testator." The object of that order appears to be to prevent any question arising as to s. 6 operating prior to the time when an assent was given to the devise. If that assent could not be given without the leave of the judge, it was obviously impossible for s. 6 to operate until an opportunity for making an application under s. 5 had also arisen. Unfortunately, in the last twelve months two applications were made to the Court: one on an originating summons for an order to extend the time limited by s. 5 of the Act for sale of "The Paddocks" for five years, and another on a summons issued in these proceedings for leave to assent to the devise of the land, it being intended, as I understand it, that those two should come on together and that no order should be made on the summons for leave to assent until the other summons to extend the time had also been brought on. I understand that the order asked for by this present summons to extend the time was sought to be obtained some weeks before the issue of the summons for leave to assent to the devise.

On July 29, 1938, an order was made by the master in chambers giving leave to assent to the devise of the remaining real estate, including "The Paddocks," in favour of the

Official Trustee of Charity Lands. "The Paddocks" was a property which was not part of the property which was to be used for the actual occupation of the charity, but it was property which was thought likely to increase very considerably in value and which it was not desired should be sold at the present time, because this was not an advantageous time for sale. Also a sale at the present time would have left the charity without sufficient income to keep up the various payments which are provided for by the scheme. On December 7, 1938, the personal representatives assented to the devise pursuant to the order which was made on July 29, 1938. The result of that assent was that "The Paddocks" vested in the Official Trustee of Charity Lands under s. 36, sub-s. 2, of the Administration of Estates Act, 1925 (1), and under s. 6 of the Mortmain and Charitable Uses Act, 1891. (2) The other summons which asked for a further extension of the time for sale of "The Paddocks" came before Simonds J. on December 19, 1938. By that time the land had vested in the Official Trustee, and the question arose whether the Court had any power to extend the time limited by s. 5, the vesting in the Official Trustee having already taken place. In consequence of that the learned judge adjourned the summons into Court, and that is the summons which comes before me now. I must therefore first of all determine whether there is any jurisdiction under the Act in the events which have happened—the unfortunate events if I may say so—of the assent having been given before the originating summons to extend the time came on. The question is whether, in those circumstances, there is any jurisdiction in the Court to extend the time within s. 5.

This matter has apparently never come before the Court for actual decision, although I think that it has been a live question for a great many years; but in the year 1903 a case came before Byrne J. of *In re Ryland* (3), when the question was raised as to whether certain interests

(1) See note (2) on p. 412.

(2) See note (3) on p. 412.

(3) [1903] 1 Ch. 467, 472, 474.

under a will were land within the meaning of s. 5, whether they vested in the Official Trustee and whether an extension of time was necessary. In that case the Court decided that part of the interest under the will was land and vested in the Official Trustee and part was not land and did not vest. In the course of the argument Byrne J. said this: "If the "Court has power after the lands have vested in the official "trustee to postpone or extend the time for sale, it would, "I think, be proper and convenient in the present case to "extend the time." There the learned judge spoke of the matter as a question whether the Court had power, and counsel appearing for the Official Trustee of Charity Lands, Mr. Vaughan Hawkins, who was a very experienced person in these matters, in the course of the argument said: "Possibly, "but the question is," and then he went off to what the real question was—namely, whether this particular interest was land or was not land. That having been said in the course of the argument, the learned judge, after deciding what part of the interest given by the will was land within the Act and what part was not, went on as follows, at the end of his judgment: "Then there is one other point which "I may mention, although it is not now before me for decision. "I am not prepared to say that when the property is in the "hands of the Official Trustee of Charity Lands there is not "power, either in the Charity Commissioners or in the Court, "as the case may be, to enlarge the time for sale of the land, "notwithstanding the fact that the year has elapsed and the "land has vested. I do not, however, decide that point, as "it is not before me." Unfortunately, the learned judge did not decide the point and it is now necessary for me to decide it, because from that time until now there appears to be no decision of the Court upon the question.

Mr. Jennings, who appears for the trustees of the charity, contends that in these circumstances, notwithstanding that this land "The Paddocks" has vested in the Official Trustee under s. 6 or in consequence of s. 6—I think that it is suggested that it has vested under the Administration of Estates Act—an application can still be made under s. 5, and the Court may determine to extend the time now for some period of time, which will enable the land to be kept unsold. Mr. Andrewes Uthwatt, who appears for the Official Trustee of Charity Lands and for the Attorney-General (who has been added as a respondent to the summons), accepts the view that s. 5 taken alone contains nothing which makes it necessary to obtain the extension of the period within the year, which is laid down as the limit within which the land must be sold. It is admitted, and I think that it has been decided in previous cases, that there is no power in the Court to divest the land out of the Official Trustee when once it is vested in him under s. 6, and that cannot be done. Whatever can be done is limited to extending the time within which the sale ought to be carried out or in which the duty of the Charity Commissioners is to see that a sale is carried out. Mr. Jennings says that it is possible to read s. 6 in such a way as not to cut down the jurisdiction which would have existed in the Court under s. 5 to extend the time, notwithstanding that the land has been vested in the Official Trustee of Charity Lands. He says that s. 6 may be read : " So soon as the time for the "time being limited for the sale of any lands under any "such assurance shall have expired without completion of "the sale of the land, the land unsold shall vest forthwith "in the official trustee of charity lands," and he says that that leaves it open to the Court to make another limit of time. Mr. Andrewes Uthwatt says that the application must be made and the order made within the period—either the year or the extended period, within whatever period is the period allowed—and that unless it is so made there is no jurisdiction to make any order extending the time further. He points out with great force that under s. 6 the vesting in the Official Trustee of Charity Lands and the duty of the Charity Commissioners to take all necessary steps for the sale or completion of the sale of such lands are both matters which are to take effect immediately upon the time limited for the sale expiring. He says that as soon as the time limited has expired without completion of the sale those two things operate together, and, the land unsold having vested in the Official Trustee, the other matter, that is the duty of the Charity Commissioners to take all necessary steps for the sale, must operate at the same time. He says that it must have begun to operate now and that there is no power in the Court to stop the Charity Commissioners taking all necessary steps.

I feel the force of that argument; but looking at these two sections together and considering the position as a whole, I do not think that I am justified in limiting the operation of s. 5, except so far as it is clearly expressly limited by the Act itself. I do not find anything which prevents me from saying that there is an extended period which the Court may determine on as the period within which the land has to be sold. That is quite apart from any question of vesting. I think that the extended period within which the land must be sold may be determined by the Court. I do not think that it is necessary to say that, because one period which was limited has expired and the land has vested in the Official Trustee, it therefore becomes impossible to extend the time further. Byrne J. clearly thought that it was an open question whether there was not power, either in the Charity Commissioners or in the Court, as the case may be, to enlarge the time for sale of the land notwithstanding the fact that the year has elapsed and the land has vested. It is entirely a matter of the construction of these two sections, and on the whole I have come to the conclusion that the Court has jurisdiction to extend the time notwithstanding that the land has vested in the Official Trustee under s. 6 of the Act.

The question then arises whether, in the particular circumstances of the case, the Court ought to make any order.

A. Andrewes Uthwatt. This part of the application is usually heard in chambers, and my course would be much easier if the matter were taken in chambers rather than in Court.

CROSSMAN J. I think that the best course is to send the matter back to chambers.

His Lordship having adjourned into chambers the hearing of the question whether in the circumstances of the case an order should be made, on February 27 made an order extending the time limited by s. 5 of the Act of 1891 for the sale of "The Paddocks" estate for a period of five years from the date of the order.

Solicitors: *Sharpe, Pritchard & Co., for W. O. Dodd, Brighton; the Treasury Solicitor.*

A. R. LL.-T.

SIMONDS J.

1939

Jan. 17, 18, 19; *Feb.* 1.

ARMOUR *v.* LIVERPOOL CORPORATION.

[1937. A. 845.]

Corporation — Municipal corporation — Tramway undertaking — Employees' superannuation fund—Voluntary unregistered association —Weekly subscriptions by deduction from wages—Contributions by corporation—Actuarial deficiency in funds—Scheme incidental to statutory powers and intra vires—Fund not for " acquisition of gain " —No contract between members of fund and corporation—Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 357.

A municipal corporation, owning and working a tramway system, in 1908 inaugurated a superannuation fund for the benefit of employees willing to join it. Each employee so joining had his wages nominally increased by twopence per week, which was actually paid to the treasurer of the fund and represented the contribution of the corporation. Each employee also agreed with the trustees of the fund to suffer a deduction of a further twopence a week from his wages also paid to the treasurer. The corporation also contributed certain other moneys, afterwards commuted into a payment of 1500*l.* a year. In 1917 rules for the administration of the fund were issued by the corporation, and one of these provided that, if the funds should become insufficient to provide the stipulated benefits, the contributions both of members and the corporation should be increased. In 1935 the corporation was advised that the fund was actuarially insolvent, and from that time it made no contribution to the fund, but the deduction of twopence a week from the wages of each member was continued, and the moneys paid into their fund. No new members from this time were admitted to the fund.

In an action brought by plaintiffs, representing members of the fund and its committee, for declarations that the corporation had agreed and had full power to agree to provide the sum of twopence per week for each member, for the purpose of payment into the fund, and that in the events which had happened there was a deficiency in the fund within the meaning of the rules, which ought to be made good by increasing the contributions both of the corporation and the members :—

Held, (1.) that the fund was incidental to the carrying on of a statutory undertaking, and therefore the contributions to it were intra vires the corporation; (2.) that there was nothing contained in any special legislation, authorizing the corporation to pay superannuation allowances to other classes of municipal employees, to invalidate the fund; (3.) that the fund, though unregistered, was not an " association formed for the acquisition of gain " and so did not require to be registered under the Companies Act, 1929, s. 357; but (4.) that on the facts there was no contract created between the corporation and the members of the fund. The plaintiffs' claim therefore failed.

ACTION.

The action was brought by five plaintiffs, the first two, George Webster Green Armour and Henry Griffiths, on behalf of themselves and all other members of the committee of management of the Liverpool Corporation Tramways Retirement Fund, two other plaintiffs representing the members of the fund, and William John Bracken, the treasurer of the fund, claiming a declaration that the defendant corporation had and at all material dates had had full power to agree to provide the sum of twopence a week by way of additional wages to each member of the fund for the purpose of forming part of the weekly subscription payable to the fund in respect of such member; payment by the corporation of all arrears of the said sums of twopence a week; and a declaration that in the events which had happened there was a deficiency in the fund which ought to be met by increasing the weekly subscription of each member, one-half of such increase to be provided by the corporation by a corresponding increase in the wages of each member.

The Liverpool Corporation by its defence denied that any contract had been created between the corporation and the fund, or its managers, or members as alleged in the statement of claim, but that if the corporation purported to enter into the contracts alleged by the plaintiffs (which was denied) the same were ultra vires the corporation and void; and, further, that the fund was not registered under the Companies Act, 1929, or any other statute.

The following statement is taken substantially from the judgment of the learned judge:—

In the year 1897 a company known as the Liverpool United Tramways and Omnibus Company was carrying on the business of a tramway and omnibus undertaking in the city of Liverpool and elsewhere. By the Liverpool Corporation Tramways Act of that year it was enacted by s. 1 that the company should sell and the corporation purchase the whole of the company's undertaking. Sect. 8 provided that every officer and servant of the company except as therein mentioned should be taken over by the corporation on the same terms as to position and emoluments as those under which they were employed by the company on March 16, 1897, with a proviso that no officer or servant so taken over should be under any obligation to contribute to or entitled to participate in the superannuation fund of the corporation unless within one month from such taking over he signified to the corporation his desire so to contribute or participate. Sect. 10 enacted that from and after the transfer all the powers, rights, privileges and authorities, duties and obligations of the company under the Acts and Orders enumerated in the Schedule to that Act should by virtue of that Act be transferred to, vested in, and imposed on the corporation, except as therein mentioned. The only other section which I need mention is s. 38, which provided that the receipts of the corporation on revenue account from the undertaking and any extension thereof should be applied (inter alia) in paying all working and other expenses in connection with the undertaking and any extension thereof properly chargeable to revenue. Under this and the later Acts of 1927 and 1931, to which I need not refer in detail, the corporation has taken over and carried on and is still carrying on a tramway and omnibus undertaking in Liverpool.

Connected with the company's undertaking was a society called the Liverpool United Tramways and Omnibus Employees' Friendly Society and was " a society established "to raise by means of entrance fees, subscriptions and fines "with the aid of donations, a fund to be applied for insuring "a sum of money to be paid on the death of a member, for "assisting members and providing medical aid during sickness "or other infirmity or while incapacitated from working "through casualty." The members of the society were to consist exclusively of persons employed by the company. The rules contained no provision for resignation from the society, but appeared to anticipate that so long as employees remained in the service of the company they should remain members of the society subject, however, to the provisions as to expulsion. Upon leaving the company's service it was provided by rule 6 that the member should cease to be a member of the society. Rules 76 and 77 of the society contained provisions for voluntary dissolution and the amendment of the rules. By rule 22 the company was expressly authorized to deduct from the weekly wages payable to each man in its employ who was a member of the society the sum of sixpence and such further sum if any as the secretary should have notified to the Company as due from such member to the society in respect of levies or fines. The society was registered as a friendly society. Shortly after its formation the company decided to act upon the authority conferred upon it, and from that time up to the transfer of the undertaking to the corporation the weekly sum of sixpence was regularly deducted from the men's wages. In addition to this measure the company made an annual donation to the funds of the society. The company's object in assisting the society in this way was to improve the condition of their employees, encourage thrift and to make some provision for the men and their families in case of death and sickness. Persons entering the company's services were apparently quite content to become members of the society and any person objecting or failing to pass the medical examination would not be appointed. After the transfer of the tramways undertaking to the corporation the corporation continued to carry out the provisions of rule 22 and, in fact, no change was made in the relations between the tramways undertaking and the society and the tramways undertaking and its employees except that the corporation in 1897 discontinued the annual donation to the society which had previously been made by the company, the provisions of rule 50 authorizing an annual distribution of the funds of the society being considered objectionable from a corporation point of view. In the year 1900 there were disagreements among the members of the society with the result that the society was wound up.

It was, however, the common desire of the corporation and its employees that, the old society having gone, some new society with the same objects should take its place, and in the same year a society was established under the name of the Liverpool Corporation Tramways

Benefit Society, having as its object the raising of a fund by subscriptions of the members thereof, by voluntary contributions and by levy (*a*) for the mutual relief of members in cases of sickness or accident, (*b*) for providing medical attendance and medicines to members, (*c*) for an allowance on the death of a member, (*d*) for an allowance on the death of a member's wife, (*e*) for such other purposes beneficial to the members including superannuation allowance if and when the funds permitted as the committee of management might thereafter from time to time resolve upon. The rules of the society contained elaborate provisions as to membership, management, contributions and benefits.

I have heard little of the activities of this society, but it seems clear that its funds did not admit of the payment of any superannuation allowances. This was a matter of concern to the corporation, who, in or about the year 1907, set about devising some scheme whereby what it regarded as a defect might be remedied. In the year 1908, after the matter had been fully considered by the appropriate committee of the council and the council itself, a fund was inaugurated which was originally, I think, called the Liverpool Corporation Tramways Benefit Society Retirement Fund, and later the Liverpool Corporation Tramways Retirement Fund. The exact relation between the so-called society and so-called fund is not easy to discern. It is sufficient to say that the so-called fund was, as was also the society, an unincorporated and unregistered association. Its object being to provide superannuation allowances, it was obvious even to those responsible for its establishment, guilty though they were of grave miscalculations, that no benefits could be paid out until a substantial sum had been accumulated by way of subscription or otherwise, and it was presumably for this reason that it was not until 1917 thought necessary to make any rules for what I will now call the fund as distinguished from the society. But in the meantime it was managed by the committee of management of the society and its funds were established by means, first, of a transfer of 3000*l.* from the society; secondly, by contributions of twopence weekly by members from their wages; thirdly, by the contribution of a further twopence weekly for each member by the corporation, this second twopence being first nominally paid by way of extra wage to the members and then deducted; and lastly by the handing over to the fund of the proceeds of unclaimed property and money left in cars and the amount of what were called conductors' "overs." I may mention, though it is out of chronological order, that in 1922 this last payment was abandoned and by the authority of the corporation an annual payment of 1500*l.* was substituted therefor.

In the year 1917 rules for the fund were drawn up and approved by the corporation. To some of them I must refer, and in doing so I will make use of the final edition, though it contains many amendments which were from time to time made in the original rules. By rule 1 the name of the association was the Liverpool Corporation Tramways Retirement Fund. As I have already pointed out, that name was the name adopted in substitution for the earlier and longer name. By rule 2 the object of the fund was stated to be to provide for the granting of superannuation allowances to members of the fund according to the rules for the time being of the fund. By rule 3 the fund was to be deemed to have been established as on July 1, 1908. Under rule 5 the membership of the fund was restricted to employees in the service of the corporation. By rule 6 it was provided that membership of the fund should consist of all employees in the service who should have been contributors to the fund before January 1, 1917, and all employees in the service who should have been admitted to membership of the fund since that date. Rule 10 provided for the event of any member ceasing to be a member by reason of his leaving the service voluntarily or otherwise and provided that in that case the committee of management should return to him the whole of his contributions paid by him during his membership. Rule 12 provided for the office bearers of the fund, and at present they are three trustees, an honorary solicitor, an honorary auditor, secretary and treasurer and a committee of management. Rule 14 provided for trustees.

Rule 30 provided: "The weekly subscription payable to "the fund in respect of each member shall be (during health "and illness) fourpence (of which twopence is provided by "the corporation by way of addition to such member's wages), "and such weekly subscriptions of fourpence shall be deducted "each week from the wages of each member of the fund so "long as he continues in the service or until he becomes "entitled to superannuation allowance from the fund." Rule 31 provided for benefits and is in these terms: "If any "member of the fund, who shall have been a member of the fund "for at least 10 years, shall become permanently incapacitated "from performing his duties, or any other duties in the service "which would enable him to earn a living, by reason of old age, "or infirmity of body or mind, or any other cause or causes "(provided that any such incapacity, infirmity, or cause or "causes shall not be due to, or the result of drunkenness, "immorality, or other misconduct or to having been engaged in "any unlawful act) he shall, subject to the provisions of these "rules, be entitled (provided that he then retires from the "service) to cease payment of his weekly subscription to the "fund, and to receive from the fund for the rest of his life a "superannuation allowance or annuity, as follows: If he shall "have been in the service for 15 years, the allowance shall be "at the rate of 10*s.* per week. The allowance shall thereafter "increase at the rate of 1*s.* per week for each complete year of "service up to a maximum of 1*l.* per week for 25 years' service "and upwards." That, as I have already observed, was the rule in the final edition which I read.

Rule 40 has been referred to often in the case and I will read it in full: "If at any time hereafter the funds of the "fund shall be found insufficient to meet the ordinary claims, "such claims, if the deficiency is not met by a grant from the "corporation, shall be met by increasing the weekly contributions of the members and the corporation in the same "proportions as set forth in rule 30." Rule 43, which provided for alteration of rules, stated: "No new rules shall be made, "nor any of the rules contained herein and hereafter to be "made, shall be amended, altered, or rescinded without the "consent of a majority of the members present at a general "meeting of the fund called for that purpose. No new rules "and no resolution for amending, altering, or rescinding any "rules shall have any force or effect till submitted to and "approved of by the committee of management of the fund "and the tramways committee of the corporation." Rule 44 provided for dissolution and was to this effect: "The fund "shall not be dissolved or its affairs wound up except with "the consent of the tramways committee of the corporation, "and on such terms and conditions as the committee may "determine with reference to the disposal of any funds or "assets which may belong to the fund after discharging the "debts thereof."

Of the fund thus established large numbers of the corporation's employees became members and each one of them before doing so signed a written agreement whereby, after stating his desire to become a member, he agreed with the trustees of the fund to be bound by its rules and that his subscriptions and contributions to the fund in accordance with the rules thereof should be deducted each week from the wages payable to him by the corporation and paid on his behalf to the fund. Except that as above stated the employee purported to agree with the trustees, it does not appear with whom the agreement is made. It is in form unilateral but it was, no doubt, used by the corporation as its authority for making deductions from wages and paying them to the fund. Roughly three-quarters of the persons eligible for membership are members and one-quarter are not.

In the year 1920 the society was wound up in the Lancaster Palatine Court and its surplus assets were by order of that Court handed over to the trustees of the fund on their undertaking to discharge certain obligations of the society.

From 1918 or thereabouts onwards the fund continued to operate, collecting its revenues and paying its benefits. By 1935 it became clear that its funds were not commensurate with the scale of its benefits and in consequence, in May, 1935, at an annual general meeting of the fund, a resolution was passed that " in view of the increasing liabilities of the fund "in respect of retirement allowance and in order to meet the "same it is expedient that members' contributions be raised "from twopence to sixpence per week and that the corporation "be requested to contribute a similar amount in conformity "with the provisions of rule 40 of the fund and that rule 30 "be amended accordingly." The corporation having obtained a report which revealed the grave actuarial insolvency of the fund, resulting in large part but by no means entirely from a policy begun in 1931 of earlier retirement of employees, and having taken legal advice as to its position, determined to make no more payments to the fund and have not done so since February, 1936. It has, however, continued to deduct the members' contributions of twopence a week from their wages and pay them to the fund. The fund has not yet failed to pay any covenanted benefits.

Sir William Jowitt K.C. and *Wilfrid Hunt* for the plaintiffs. There are two questions raised in this action, which is of a perfectly friendly character, brought to ascertain the rights of the parties, and these are (1.) is there a subsisting contract between the corporation and the members of the fund, and (2.) if there is such a contract, is it one intra vires the corporation.

On the first question it is submitted that on the admitted facts a contract was entered into between the corporation and every employee who decided to become a member of the fund and signed the agreement to authorize the corporation to deduct twopence per week from his wages, to be paid into the fund, together with payments by the corporation, and to be bound by the rules. The corporation induced the members to enter into the contracts by representations that it would make certain contributions to the fund, and each party has done so. On the question of intra vires the corporation has statutory powers to work the tramways of the City of Liverpool, and it is clearly incidental to those powers that it should have power to found and to contribute to a pension or superannuation fund: see *Hutton* v. *West Cork Ry. Co.* (1); *Henderson* v. *Bank of Australasia* (2); and the case which is

(1) (1883) 23 Ch. D. 654.

(2) (1888) 40 Ch. D. 170.

perhaps nearest to the present one, *Cyclists' Touring Club* v. *Hopkinson* (1), followed recently in *Wimbledon and Putney Commons Conservators* v. *Tuely*. (2) A pension fund is an ordinary business expense.

The decision of Eve J. in *In re Lee Behrens & Co., Ld.* (3), holding that it was not incidental to the business of a company to grant a pension to the widow of a director, is an exceptional case and distinguishable from the others. A director is not an employee of a company. [The Companies Act, 1929, s. 357, was also referred to.]

Comyns Carr K.C. and *Hartley Shawcross* for the defendants. Apart from the special powers contained in local Acts and the Local Government Employees (Superannuation) Acts, 1922 and 1937, the corporation has no such powers as are claimed, and, assuming there is any contract between the members of the fund and the corporation, such a contract is ultra vires.

The only case of those cited on behalf of the plaintiffs which is like the present one is that of *Wimbledon and Putney Commons Conservators* v. *Tuely*. (2) But in that case the attention of the learned judge was not called to a case under the Municipal Corporations Act, 1835, of *R.* v. *Brown*. (4) There it was held that the payment of a pension to a retired schoolmaster was not for the public benefit of the inhabitants of Newcastle-upon-Tyne, and therefore not within the powers of the corporation.

For over one hundred years, from 1829 to 1937, Parliament has frequently legislated for the purpose of establishing superannuation schemes for the benefit of municipal and Local Government employees, on the theory that no such general power as that claimed existed. Under the Municipal Corporations Act, 1882, there is no power to make any payment, other than those prescribed by the Act, out of the Borough Fund, except under statutory authority. The corporation has no power to pay two workmen doing the same work at two different rates of pay, because one of them joins the superannuation fund and the other does not. The extra twopence a week is simply a contribution to the fund, and is not a payment necessary to secure the contented services of the men. See *Roberts* v. *Hopwood* (1) and *In re McGrath's decision* (2) per Maugham L.J. See also the Report of the Departmental Committee on Superannuation Schemes of Local Authorities, 1919. That report showed that corporations had no power to grant superannuation allowances at the expense of the rates, except in special cases such as police and school-teachers. There are several special schemes in Liverpool, all authorized by statute, beginning with the Liverpool Improvement Act, 1882. The Local Government Superannuation Act, 1922, was the earliest Act to give local authorities power to create superannuation funds.

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(1) [1910] 1 Ch. 179.
(2) [1931] 1 Ch. 190.
(3) [1932] 2 Ch. 46.
(4) 39 J. P. Newsp. 388.

Secondly, this is an unregistered association for the purpose of the acquisition of gain, and, not having been registered under the Companies Act, 1929, or the Friendly Societies Acts, is illegal under s. 357 of the Companies Act: *In re Padstow Total Loss and Collision Assurance Association* (3); *Greenberg* v. *Cooperstein.* (4)

Finally the question arises, what is the alleged contract on which the plaintiffs rely? It is admitted that there is an actuarial deficiency, but rule 40 deals only with an actual deficiency in the fund, and there is at present no such deficiency. No individual contract between the corporation and any of the members can be extracted from the rules. There is no source from which a contract to make these payments for the lives of members can be derived.

Sir William Jowitt K.C. in reply. A corporation with power to carry on a statutory undertaking has both a power and a duty to make all payments reasonably incidental thereto unless there is an express prohibition against doing so: *Attorney-General* v. *Great Eastern Ry. Co.* (5); *Attorney-General* v. *Smethwick Corporation* (6); *Attorney-General* v. *Fulham*

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(1) [1925] A. C. 578.
(2) [1934] 2 K. B. 415, 435.
(3) (1882) 20 Ch. D. 137.
(4) [1926] 1 Ch. 657.
(5) (1880) 5 App. Cas. 473.
(6) [1932] 1 Ch. 562.

Corporation. (1) See also the Municipal Corporations Act, 1882, s. 167, and Sch. V.

The Local Government (Superannuation) Act, 1922, implies and recognizes the existence of superannuation schemes for the employees of local authorities at the date when it was passed. The Act was necessary in order to legalize gratuities to ex-servants. The agreed statement of facts shows clearly what the contract was. An offer was made to and accepted by all the employees who came into the fund. The contract was created by conduct: *Carlill* v. *Carbolic Smoke Ball Co., Ld.* (2)

Every man represented by the plaintiffs has suffered a deduction of twopence per week from his wages in accordance with a contract with the corporation, the terms of which are to be found in the rules. The contract is one between the corporation and each member of the fund.

The word "deficiency" in rule 40 does not mean that the fund is gone, but that it has become actuarially deficient.

Cur. adv. vult.

1939. Feb. 1. SIMONDS J. [having stated the facts substantially as above set out, proceeded:] It was in these circumstances that the present action was begun, the plaintiffs being two persons who purport to sue on behalf of themselves and all others the members of the committee of management of the Liverpool Corporation Tramways Retirement Fund, two other persons who purport to sue on behalf of themselves and all other the members of the said fund who are not plaintiffs in this action, and one other person who is described as the treasurer of the fund. They unite in claiming "A declaration that the corporation "(*a*) has and at all material dates had full power and authority "to agree to provide and to provide (i.) the sum of twopence "a week by way of addition to the wages of each member of "the fund for the purpose of forming part of the weekly "contribution to the fund in respect of such member, and "(ii.) the said annual sum of 1500*l.* to form a further

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(1) [1921] 1 Ch. 441.

(2) [1893] 1 Q. B. 256.

"contribution to the fund"—it will be remembered that that 1500*l.* was in substitution for certain other payments which were originally made—"and (iii.) such further weekly sums by "way of addition to the wages of each member of the fund "as are or may become payable pursuant to rule 40 as further "contributions to the fund"; and, secondly, a declaration that the corporation "was and is bound to provide the said "weekly sums under head (*a*) (i.) and the said annual sum "under head (*a*) (ii.)," and certain further relief to which I need not now refer.

The defendant corporation defends the action on numerous grounds. The first defence is that, whether or not there is any otherwise enforceable contract for payment of the above mentioned sums, it was not and is not competent for the corporation to pay or to contract to pay them. It was to this question that the greater part of the argument before me was directed, for on its solution depends the possibility of finding a way out of the practical difficulties in which all parties find themselves as a result of embarking on a financially unsound scheme.

The corporation was created by Royal Charter. It has, therefore, generally speaking, all the powers of a natural person. If it transgresses the limits expressly or impliedly laid down in its charter, the result is not that its acts are ultra vires, but that it runs the risk of having its charter revoked in appropriate proceedings. But though in this sense the powers of the corporation are unlimited, yet it is also a municipal corporation and as such subject to the general law relating to municipal corporations. Broadly speaking, this means that its activities and powers are in fact limited to those on which it can as a municipal corporation spend its funds. But even this is not an exhaustive statement of the position, for the corporation has also its own special Acts which will have to be taken into consideration in determining whether or not any particular activity is intra vires.

On the question of vires a large number of authorities have been cited to me. They appear to establish that the statement of the law of ultra vires made by Lord Selborne L.C. in

Attorney-General v. *Great Eastern Ry. Co.* (1): "that this "doctrine ought to be reasonably, and not unreasonably, "understood and applied, and that whatever may fairly be "regarded as incidental to, or consequential upon, those things "which the Legislature has authorized ought not (unless "expressly prohibited) to be held by judicial construction, to "be ultra vires," is equally applicable to all kinds of undertakings which are carried on by municipal or other bodies under the authority, direct or indirect, of the Legislature. Unless, then, I can find either in the general law affecting municipal corporations, or in the special Acts affecting this corporation, any prohibition, I must conclude that this corporation has, as incidental to its statutory power to carry on a tramway undertaking under the several Acts referred to at the beginning of this judgment, the power to contribute to the fund established in 1908 for the benefit of its employees. It is not in my view open to any question on reason or authority that such a power can fairly be regarded as incidental to the carrying on of a tramway undertaking. To assist in removing from the minds of its employees the fear of an unprotected old age, to foster their happiness and contentment, and to procure their good and efficient service, these are objects which, even if economic considerations alone count, are incidental, if not vital, to the proper carrying on of any undertaking as well by a municipal as any other corporation.

Is there, then, in the general law affecting municipal corporations, or the special law affecting this corporation, any prohibition which makes ultra vires what would otherwise be intra vires? On this point Mr. Comyns Carr, on behalf of the corporation, adduced to me an argument of much cogency. He pointed out how, under the general law, provision had been made in certain cases and under certain safeguards for the grant by local authorities of superannuation allowances, for example, by the Poor Law Officers' Superannuation Act, 1896, and by the Local Government and Other Officers' Superannuation Act, 1922, and, finally, by the Local

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(1) 5 App. Cas. 473.

Government Superannuation Act, 1937; further, that under several special Acts, for example, the Liverpool Improvement Act, 1882, and the Liverpool Corporation Acts, 1893, 1913, 1921 and 1936, the corporation had been authorized by the Legislature to pay superannuation allowances and establish superannuation funds in the particular circumstances and subject to the particular safeguards indicated or prescribed in those Acts; and he urged that I ought not, in face of this body of general and special legislation directed to the payment of superannuation allowances, to regard as fairly incidental to the carrying on by the Liverpool Corporation of this tramway undertaking a power to make contributions to a superannuation fund in whatever manner they might reasonably think expedient.

I am unable to accede to this argument. If it was incumbent on me to regard the total body of legislation, general and special, as a consistent and exhaustive whole, I might indeed be driven to this conclusion, but I cannot do so. The general Acts to which I have been referred cannot, on any fair reading, be construed as excluding the participation by a local authority in a voluntary superannuation scheme as incidental to the carrying on of a commercial undertaking, nor can the special Acts, which in regard to certain classes only of officers and servants of the corporation authorize or prescribe a compulsory superannuation fund, amount to a prohibition against contribution to a voluntary scheme for their employees. It may well be, indeed, I think it is, desirable, as this case shows, that a corporation should not be allowed to join in and encourage any scheme, voluntary or otherwise, except under safeguards which reasonably insure its actuarial solvency, but I cannot, after a somewhat long consideration of all the relevant legislation, say that this is what Parliament has done.

On the first point, then, I am of opinion that the corporation had and has power to contribute to the fund established in 1908. It was then urged that the fund contravened s. 357 of the Companies Act, 1929, and was an illegal association to which the corporation could not make payments. That section provides: "No company, association or partnership "consisting of more than twenty persons shall be formed for the "purpose of carrying on any business (other than the business "of banking) that has for its object the acquisition of gain "by the company, association, or partnership, or by the "individual members thereof, unless it is registered as a company "under this Act," or satisfies certain other conditions to which I need not refer. The fund was not registered under the Companies Act, 1929, or its predecessors, nor does it satisfy any of the other conditions. It consists of more than twenty members. Does it carry on any business and is its object the acquisition of gain for itself or its members? I think that the answer to these questions is clearly "No." It was argued that the association carried on the business of mutual insurance and that each member hoped and expected to make a gain by his participation. For this proposition *In re Padstow Total Loss and Collision Assurance Association* (1) was cited. In my judgment it is a misuse of language to describe the transactions of such a society as the business of mutual insurance. It is no doubt somewhat difficult to draw the line on one side of which such an association as the Padstow Total Loss and Collision Assurance Association and on the other such humble institutions as the slate club and the goose club clearly fall. Neither "business" nor "gain" is a word susceptible of precise or scientific definition. The test appears to me to be whether that which is being done is what ordinary persons would describe as the carrying on of a business for gain, and applying this test I have no doubt that the activities of this fund cannot fairly be so described.

It was next contended that the fund was an illegal association to which the corporation could not contribute because it was not registered under the Superannuation and Other Trusts (Validation) Act, 1927. I cannot help thinking that this contention was based on some misconception. The Act to which reference is made was designed to validate certain trusts which would otherwise be void for infringement of the rule against perpetuities. It uses in this connection

(1) 20 Ch. D. 137.

SIMONDS J.

1939

ARMOUR v. LIVERPOOL CORPORATION.

the word "fund" in its natural meaning and provides in effect that funds for superannuation and certain other purposes may under prescribed conditions be registered, and that, if a fund is registered the rule of law relating to perpetuities shall not apply and shall be deemed never to have applied to the trusts of it. The plea which I have last mentioned is presumably intended to be a plea that there is a trust of the property of this fund which is void for perpetuity and has not been saved by registration under the Act. The corporation did not indicate by their pleading or otherwise what are the trusts which are invalid or wherein lies their invalidity, and I have been unable myself to detect the vice of perpetuity in any trust or disposition of the property of the association.

Having decided that the corporation was not and is not debarred from contributing to this fund, I have next to determine whether the plaintiffs, or any of them, are entitled to the relief claimed in this action. Here the case is far from satisfactory. I have already stated who the plaintiffs are. If they are to succeed in their action, it can only be on the basis of contract. This disposes at once of the plaintiffs Armour and Griffiths, who sue on behalf of themselves and the other members of the committee of management of the fund, and of the plaintiff Bracken, who sues as treasurer of the fund. At an early stage it became apparent that no contract to which they, or any of them, on the one hand, and the corporation, on the other, were parties could be formulated. This leaves the plaintiffs Lloyd and Glasby, who sue on behalf of themselves and all other members of the fund. Suing thus in a representative capacity they must rely on some contract common to the class which they claim to represent. For that reason I can attach no importance to such incidents as the encouragement given as far back as 1909 by officers of the corporation to the employees to join the fund. It may be that individual members who saw posters and listened to speeches in that year might on them found the argument that the corporation had promised on its part to make certain contributions if they would become members, and thus establish the necessary contractual

SIMONDS J.
1939
ARMOUR v. LIVERPOOL CORPORATION.

relation. But to the great bulk of the members such a contention would not be open, and for this purpose I can only rely on factors which on the available evidence I may fairly assume to be common to them all.

The only common factors which I have been able to find are (*a*) that the corporation in fact deducted from the wages of each member the weekly sums contributable by him to the fund, and (*b*) that it did so with the authority of the agreement signed by each member to which I have already referred. This agreement, as I have pointed out, was not with the corporation, but it is a proper inference from all the facts that the corporation was aware of the terms and of the fact that each member signed it. It is probably the case that each member knew that the corporation by its officers was taking some part in the administration of the fund and contributing to it, but this is speculation and I should not be justified in founding on any such speculation. Are there, then, here the elements on which I can find a contract concluded with the corporation and each member by which the corporation bound itself to contribute to the fund ? It is said that somewhere and somehow there was an offer by the corporation and an acceptance by each member so that I can apply the principle of *Carlill* v. *Carbolic Smoke Ball Co., Ld.* (1), and say that a contract was thus concluded. But if I ask what was the offer and how was it made, I find no answer. I have read and re-read the statement of claim with the care which its authorship deserves, and I am left with the impression that, if indeed a contractual relation was capable of being established, it would have been stated without the vagueness and circumlocution which I find in that document. Even at the conclusion of the hearing I felt the same uncertainty about what was the contract for which the plaintiffs contended. They did not, I think, at any time distinguish between the source of the alleged liability of the corporation to make weekly contributions of twopence a member and that of its alleged liability to make an annual contribution of 1500*l.* a year to the fund. The liability in both respects was to be

(1) [1893] 1 Q. B. 256.

found in one contract, whatever it was; and so also was the alleged liability to make further contributions in accordance with rule 40 of the rules of the fund. But the annual contribution of 1500*l.* is not referred to in the rules.

The contract, then, is not to be found in an offer by the corporation to be bound by the rules if each member would be so bound, though that appeared to me at one time an attractive way of putting the plaintiffs' case. I am not justified in further attempts to write out the terms of a contract which might have been made and inferring it from the circumstances. In fact, there was in my judgment no contract, and I am inclined to think that there was no contract just because the corporation was making gratuitous contributions to the fund and had no intention to do anything else than to keep an absolutely free hand, reserving to itself the right to terminate its part in the scheme just as it had the right to put an end to the employment of any one of the members of the fund. But whether this is so or not, it is for the plaintiffs to establish without ambiguity how the contract was made and what were its terms. This they have, in my judgment, failed to do and their action must fail.

I would only add with regard to the suggested liability of the corporation to make increased contributions under rule 40 that I feel great difficulty in giving any certain meaning to the words expressing the condition on which that liability arises. I think that I must reject the suggestion that they refer to actuarial insolvency (which would itself be a condition depending on numerous unascertained factors) and hold that they refer to an actual present insufficiency to meet ordinary claims. If so, apart from all other considerations, it seems clear that the condition on which the liability to make further contributions arises has not arisen, and for that reason also the plaintiffs' claim under this head must fail.

Solicitors: *Silverman & Livermore, Liverpool; F. Venn & Co., for W. H. Baines, Town Clerk, Liverpool.*

H. L. L.

KNIGHTSBRIDGE ESTATES TRUST, LIMITED *v.* BYRNE AND OTHERS.

C. A.
1938
Oct. 25, 26, 27, 28; Dec. 1.

[1937. K. 171.]

Mortgage—Real estate—Demise for long term—Covenant for repayment by eighty half-yearly instalments—Not an infringement of the rule against perpetuities—Clog on equity of redemption.

A company, owning a large number of freehold properties in the county of London, mortgaged them by deed in 1931 to a friendly society to secure a loan of 310,000*l.* By the deed the company (the respondents) by clause 1 covenanted (inter alia) with the friendly society (the appellants) to repay to them the principal moneys so borrowed with interest, by eighty half-yearly instalments of principal and interest combined, on the two half-yearly days therein mentioned. There was the usual proviso in case of default. By clause 2 the respondents demised the mortgaged land to the appellants for a long term of years, with the usual proviso for cesser. There was a further covenant by the respondent company with the appellants that, if the company should (inter alia) pay the appellants the sum so borrowed with the appropriate interest by the instalments and on the half-yearly days mentioned in the deed, and should not have committed any breach of any covenant in the deed or any breach of any obligation, statutory or otherwise, binding on the respondents, then the appellants would accept payment of the sum so lent on mortgage by the instalments and in the manner specified in the deed and would not require payment of such principal moneys otherwise than by such instalments:—

Held (affirming the decision of Luxmoore J.), that the term of forty years did not infringe the rule against perpetuities, the rule not being applicable to mortgages.

Held (reversing the decision of Luxmoore J.), that there were no provisions in the deed that were, from the point of view of the mortgagor, onerous and unreasonable, and that, therefore, there was no clog on the equity of redemption.

APPEAL from a decision of Luxmoore J. (1)

In these proceedings the plaintiff company (the respondents to the appeal) claimed (inter alia) a declaration that notwithstanding the provisions in a mortgage deed entered into between them and the defendants (the appellants to the appeal) for the repayment by them to the defendants of the principal moneys thereby secured together with the interest therein mentioned by eighty half-yearly instalments of principal and interest combined of 9308*l.* 14*s.* 3*d.* each, the plaintiffs were entitled, on giving the usual notice, to redeem the mortgage upon payment of the principal moneys secured thereby with interest to the date of redemption and the proper costs of the mortgagees thereunder.

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(1) [1938] Ch. 741.

The deed was dated November 6, 1931, and was made between the plaintiff company (therein called " the borrower ") of the one part and the defendants, who were the trustees of the Royal Liver Friendly Society (therein called " the mortgagees "), of the other part. After reciting that the borrower was seised of the freehold properties mentioned in the schedule thereto in fee simple in possession and that the mortgagees had agreed to advance to the borrower the sum of 310,000*l.* out of funds belonging to them as such trustees, it was witnessed by clause 1 that the borrower thereby covenanted with the mortgagees to pay to them the sum of 310,000*l.*, together with interest at 5¼ per cent. per annum, notwithstanding any judgment or order in which the covenant might become merged, by eighty half-yearly instalments of principal money and interest combined of 9308*l.* 14*s.* 3*d.* each (less income tax at the rate for the time being in force on such part thereof as should represent interest to the due date of payment of such instalment on the principal sum for the time being outstanding), such instalment to be paid on the dates and at the place therein more particularly mentioned. The clause contained a proviso that if default should be made by the borrower in payment of any one of the half-yearly instalments of principal money and interest on the days thereinbefore appointed for payment of the same or within fourteen days afterwards, the whole of the principal money for the time being secured by the mortgage deed together with interest thereon to date at the rate of 5¼ per cent. per annum should immediately become payable by the borrower and be recoverable forthwith by the mortgagees by all or any of the remedies conferred on them by statute or otherwise. By clause 2 the borrower as beneficial owner demised unto the mortgagees all the freehold properties shortly described in the schedule thereto, to hold the same unto the mortgagees for a term of three thousand years from the date of the mortgage without impeachment of waste, subject to covenants on the part of the borrower and certain stipulations contained in a conveyance and subject to and with the benefit of an under-lease and agreements for tenancy in the mortgage deed more particularly referred to, and subject also to the proviso for cesser therein mentioned—namely, that if the borrower should pay to the mortgagees the sum of 310,000*l.* with interest thereon at the rate of 5¼ per cent. per annum by the instalments at the respective times and in manner specified in the covenant by the borrower thereinbefore contained and if the borrower should also pay to the mortgagees all costs, charges, expenses and payments properly incurred or payable or allowable to the mortgagees in relation to or incidental to the security together with interest at the said rate according to the covenant by the borrower thereinbefore contained, the mortgagees would at the request and cost of the borrower surrender the properties thereby mortgaged unto the borrower or the persons deriving title under it, or as it, he or they might direct.

By clause 3 the mortgagees covenanted with the borrower that if the borrower should pay to the mortgagees the sum of 310,000*l.*, with interest thereon at the rate aforesaid, by the instalments (of principal and interest combined) on the half-yearly dates and in the manner thereinbefore provided, or should pay the same within fourteen days next after the day so appointed for payment thereof, and if there should not have been any breach of any obligation, statutory or otherwise, binding on the borrower or any of the covenants, whether express or implied, therein contained, and on its part to be observed and performed, then and in such case the mortgagees should accept payment of the sum of 310,000*l.* and interest thereon by the instalments and in manner aforesaid, and would not require payment of such principal money otherwise than by such instalments.

It was further provided that the mortgagees should be at liberty to exercise all the powers conferred upon mortgagees by the Law of Property Act, 1925, if the plaintiff company should sell the equity of redemption of the mortgaged hereditaments or any part thereof without the written consent of the mortgagees, such consent not to be unreasonably withheld.

Luxmoore J. held that the period of postponement for redemption for forty years, together with other provisions in the deed, was, from the point of view of the mortgagor, onerous and unreasonable and constituted a clog on the equity, and that the plaintiff company was entitled to the declaration sought.

The defendants appealed from that decision. The appeal was heard on October 25, 26, 27, 28, 1938.

J. M. Gover K.C., *Sir William Jowitt K.C.*, and *Wilfrid Hunt* for the appellants. The effect of the judgment of Luxmoore J. was that the mortgagors had the right to redeem at any time, while the mortgagees were bound by their deed. The doctrine of the clog on the equity of redemption was improvised to meet the case of an impecunious landowner in the hands of an unscrupulous moneylender. That is not the case here. If A contracts to repay money owing to B on a certain date or by instalments up to a certain date, equity cannot interfere nor can B compel A to repay nor can B repay before that date: see Lord Parker's judgment in *G. & C. Kreglinger* v. *New Patagonia Meat and Cold Storage Co.* (1) *Brown* v. *Cole* (2) deals with the case where the money is repayable by instalments. In *Williams* v. *Morgan* (3) the proviso for redemption did not import a condition that interest was to be paid half-yearly on the specified dates and therefore the mortgagee could not foreclose on failure to pay the interest on the specified dates. The same point arose in *Bovill* v. *Endle.* (4) *West Derby Union* v. *Metropolitan Life Assurance Society* (5) is an authority for the proposition that a lender cannot be compelled to accept payment of the sum due until the date of redemption. Lord Parker in *G. & C. Kreglinger* v. *New Patagonia Meat and Cold Storage Co.* (6) deals

(1) [1914] A. C. 25, 47–8.
(2) (1845) 14 Sim. 427.
(3) [1906] 1 Ch. 804.
(4) [1896] 1 Ch. 648.
(5) [1897] A. C. 647.
(6) [1914] A. C. 25, 50.

with clogs on the equity of redemption. There are no such clogs here. Jessel M.R. in *Teevan* v. *Smith* (1) did not mean to say that a longer period than five or seven years for redemption was bad. Neither that case nor *In re Hone's Estate* (2) are authorities for the proposition that any particular period of postponement of redemption is bad. *Talbot* v. *Braddill* (3) and *Cowdry* v. *Day* (4) deal with the same point. In *Biggs* v. *Hoddinott* (5) the form of mortgage was quite different to the one here. Romer J. there (6) cites with approval the judgment of Jessel M.R. in *Teevan* v. *Smith.* (1) He also deals at length with *Jennings* v. *Ward* (7), where there was a collateral agreement, which was in itself unconscionable. In *Bradley* v. *Carritt* (8) there was a fetter on the equity of redemption, but *Biggs* v. *Hoddinott* (5) was approved of on the question of the period for redemption. In *Morgan* v. *Jeffreys* (9) Joyce J., in holding that a proviso against redemption for twenty-eight years exceeded reasonable limits, took into consideration other conditions in the deed which he considered oppressive to the mortgagor. In any event the question of period is more important between two individuals, whose period of life is limited, than between two companies or corporations.

In *Fairclough* v. *Swan Brewery Co.* (10) it was held that the equity of redemption must not be crippled in any way, but the question there raised was considered on the merits of the case. The Court only intervenes to vary the bargain between parties when the bargain is unconscionable or, in the case of a mortgage, when there is a clog on the equity of redemption, which renders the mortgage practically irredeemable: *In re Fortescue's Estate* (11); *Davis* v. *Symons.* (12) Neither is true here. Further, if any principle of equity applied here, it would be necessary to see whether it affected

(1) (1882) 20 Ch. D. 724, 729.
(2) (1873) Ir. R. 8 Eq. 65.
(3) (1683) 1 Vern. 183 and (1686) at p. 393.
(4) (1859) 1 Giff. 316.
(5) [1898] 2 Ch. 307.
(6) Ibid. 307, 311.
(7) (1705) 2 Vern. 520.
(8) [1903] A. C. 253.
(9) [1910] 1 Ch. 620.
(10) [1912] A. C. 565.
(11) [1916] 1 I. R. 268.
(12) [1934] Ch. 442.

C. A.
1938
KNIGHTS-BRIDGE ESTATES TRUST, LD. v. BYRNE.

the mortgage in whole or in part. It is said that the proviso for redemption over forty years is void, but that the whole mortgage is not void, nor is the contract to repay in eighty half-yearly instalments. Therefore it can only be the proviso for redemption that is void, and the strange result would follow that there is none, although no doubt the Court would imply such an obligation.

[SIR WILFRID GREENE M.R. Is not the right view not that something in the deed is void, but that, notwithstanding the provisions of the mortgage, equity will give a right to redeem on notice ?]

There is no clog on the equity of redemption here, and, if there is an unconscionable bargain, equity avoids the whole of it.

[FARWELL J. Equity intervenes to prevent the enforcement of such a bargain.]

In any case equity will not create an inequitable position, as the order of Luxmoore J. does, by allowing redemption on six months' notice without conferring on mortgagees the corresponding right to enforce payment.

[FARWELL J. referred to *Lodge* v. *National Union Investment Co.* (1)]

Luxmoore J. criticized the mortgage deed on two or three grounds. Then it was said that, even if only a few instalments of principal and interest remained unpaid, the mortgagors were still debarred from selling a single house forming part of the mortgaged property. The answer to that is that the mortgagor can sell free of the charge in the manner indicated in s. 50 of the Law of Property Act, 1925.

[SIR WILFRID GREENE M.R. Under s. 50 a mortgagor in order to be free of the mortgage has to pay the whole of the outstanding debt into Court.]

Complaint has also been made as to the restriction on the mortgagor's power of leasing, but that is very usual and in no way unconscionable. Again the principle which protects a party to a contract, when the bargain is unconscionable, only applies when the parties were not at arm's length and not bargaining on equal terms. For equity to intervene, there must be something in the relation between the parties enabling the one to take an unfair advantage of the other: *Earl of Aylesford* v. *Morris* (1); *In re A Debtor* (2); and *Samuel* v. *Newbold.* (3) There is no such special relationship here, nor is there a clog on the mortgage rendering the right to redeem illusory.

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(1) [1907] 1 Ch 300.

F. R. Evershed K.C. and *J. H. Stamp* for the respondents. The form of the order of Luxmoore J. was in substance a matter of agreement, and it is not suggested that the mortgagees have not under it a right to require redemption.

On the substance of the case, it must be remembered that a mortgage is in essence a security for a loan of a sum of money and the security is released on payment of the principal. Here, however, no part of the security is to be released, although 90 per cent. or more of the principal has been repaid. The right to redeem is of the essence of a mortgage, and the Courts have said that the right must be a reasonable one, and, when this is not so, they will confer a right of redemption contrary to the provisions of the deed. That is the position here. It is said that the Court will not interfere with the bargain, but the correspondence shows that it was contemplated on both sides that the letter of the bargain would not be insisted on. In the result, the bargain it is sought to enforce has proved oppressive and unreasonable and different from what was anticipated. The mortgagors needed the loan and had to put up with the best terms they could obtain. Just as in the case of a fiduciary relationship, there is a relationship between mortgagor and mortgagee that entitles the Court to intervene to regulate the bargain. That is not to say that the Court only intervenes when there is practically no right of redemption. It is sufficient that the right of redemption should be unreasonable. It cannot be reasonable that as the result of the mortgage the mortgaged property could not be dealt with for forty years: *Morgan* v. *Jeffreys* (4) and *Davis* v. *Symons* (5): none of the houses comprised in the mortgage can in practice be dealt with for forty years. The mortgagees have wide powers, which they can exercise without giving any notice, and, as already pointed out, there is an obligation on the mortgagors to repay the bulk of the principal money without getting any return of the properties. All these matters entitle the mortgagors to say that the equity of redemption is so restricted that relief should be given: compare *G. & C. Kreglinger* v. *New Patagonia Meat and Cold Storage Co.* (1) and *Noakes & Co.* v. *Rice* (2), where it is pointed out that the right of redemption is of the essence of a mortgage and that equity will not permit any contrivance preventing or impeding redemption.

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(1) (1873) L. R. 8 Ch. 484, 489.

(2) [1903] 1 K. B. 705, 709.

(3) [1906] A. C. 461, 468.

(4) [1910] 1 Ch. 620.

(5) [1934] Ch. 442.

[SIR WILFRID GREENE M.R. A clog is something which prevents the mortgagor from getting back his property free of any fetter when it is redeemed.]

The equity of redemption is also clogged when redemption is unduly delayed: *Talbot* v. *Braddill* (3); *Biggs* v. *Hoddinott* (4); *Morgan* v. *Jeffreys* (5); *Fairclough* v. *Swan Brewery Co.* (6); *In re Fortescue's Estate* (7); and *Davis* v. *Symons.* (8) That is true here of a restriction which prevents redemption of a single house for forty years.

If, however, the Court decides that there is not a clog on the mortgage and that equity will not intervene on the ground that the bargain is unconscionable, the rule against perpetuities is relied on, because under the mortgage the right of redeeming may arise beyond the period permitted by the rule. Under the law as it stood since 1925 a three thousand years' term is vested in a mortgagee of freehold property, and in view of the terms of the present mortgage that term can only be terminated so as to entitle the mortgagor to re-enter as owner in fee after forty years have elapsed. The rule against perpetuities therefore applies: see Gray on the Rule against Perpetuities, 3rd ed., p. 460, where it is stated that, if a right of re-entry may not arise within a life in being or twenty-one years after, it is bad. There, it is true, a pre-1925 mortgage was being considered, and the question remains open whether anything that has happened since has altered this.

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(1) [1914] A. C. 25, 56.
(2) [1902] A. C. 24, 30.
(3) 1 Vern. 183.
(4) [1898] 2 Ch. 307.
(5) [1910] 1 Ch. 620.
(6) [1912] A. C. 565.
(7) [1916] 1 I. R. 268, 278.
(8) [1934] Ch. 442.

[SIR WILFRID GREENE M.R. We must consider the position under the old law, for it is difficult to think that the change in the form of mortgage has affected the application of the rule against perpetuities.]

After the rule against perpetuities had been in existence for 150 years its application was laid down in the Third Report of the Real Property Commissioners, made in 1832. In that report the Commissioners said that the rule against perpetuities did not apply then to future estates or interests created by common law assurances and right of re-entry for breach of condition, although (as they go on to say) a perpetuity may be affected by the creation of a long term of years with a power to determine it on an event not within the limits of the rule. And they recommend the extension of the rule. That so-called modern rule against perpetuities was first fully expounded in the *Duke of Norfolk's Case*. (1) However, the rule as stated in the Third Report of the Real Property Commissioners began to change in the latter half of the nineteenth century: *London & South Western Ry. Co.* v. *Gomm.* (2) That case formulated the proposition that a right to property which may arise beyond the limit allowed by the rule against perpetuities is bad. This was followed by *In re Frost* (3), where it was said that the rule against perpetuities applied to legal contingent remainders, and *In re Hollis' Hospital (Trustees of) and Hague's Contract* (4), where Byrne J. held that a right at law to determine an estate of inheritance, which might take effect outside the limits of the rule, was void as infringing the rule. This decision was followed by Farwell J. in *In re Ashforth* (5): see also *In re Da Costa.* (6) The mortgage in the pre-1925 form is covered by those cases: see also *In re Tyrrell's Estate.* (7)

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(1) (1685) 3 Ch. Cas. 1.
(2) (1882) 20 Ch. D. 562.
(3) (1889) 43 Ch. D. 246.
(4) [1899] 2 Ch. 540.
(5) [1905] 1 Ch. 535.
(6) [1912] 1 Ch. 337.
(7) [1907] 1 I. R. 194.

It is clear, then, that the application of the rule has been largely extended since the report of the Real Property Commissioners: see, however, Challis's Law of Real Property, 3rd ed. (1911), pp. 186, 207, 213, where the later decisions are sharply criticized. It has been suggested that mortgages are outside the application of the rule: see Halsbury's Laws of England, 2nd ed., vol. 25, p. 160. The cases there cited in support of this view are *Quart* v. *Eager* (1); *Wood* v. *Drew* (2); and *Morgan* v. *Davey* (3), but when examined carefully none of these bear on the question. The expressions of opinion by Kay J. and Sir George Jessel M.R. in *London & South Western Ry. Co.* v. *Gomm* (4); Byrne J. in *In re Hollis' Hospital* (*Trustees of*) *and Hague's Contract* (5); and Farwell J. in *In re Ashforth* (6) afford ample justification for a contrary view.

Gover K.C. in reply.

[SIR WILFRID GREENE M.R. The Court will not trouble you, except on the point about the rule against perpetuities.]

The rule never applies to mortgages: they are not within the mischief against which the rule was devised, and they have always been treated as exceptions to the rule. Equity always regarded the mortgagor as having the equity of redemption. The rule makes something void, as in *In re Frost.* (7) That cannot apply to mortgages. The proviso for redemption was a covenant. A contract to sell Blackacre in forty years would be a perfectly good contract. The point had to be considered in *Worthing Corporation* v. *Heather* (8): see also *South Eastern Ry. Co.* v. *Associated Portland Cement Manufacturers* (1900), *Ld.* (9) In any case the rule does not apply where a term of years is concerned, whether in a lease or otherwise: see Halsbury's Laws of England, vol. 25, p. 122, para. 219.

The rule against perpetuities cannot be applicable to a covenant in a mortgage such as we are dealing with here.

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(1) (1909) 12 Ont. W. R. 735.

(2) (1864) 33 Beav. 610, 615.

(3) (1883) Cab. & El. 114.

(4) 20 Ch. D. 562.

(5) [1899] 2 Ch. 540.

(6) [1905] 1 Ch. 535.

(7) 43 Ch. D. 246.

(8) [1906] 2 Ch. 532, 538, 541–2.

(9) [1910] 1 Ch. 12, 24–5, 28–9, 33.

C. A.
1938
Knightsbridge Estates Trust, Ld.
v.
Byrne.

1938. Dec. 1. The judgment of the Court (Sir Wilfrid Greene M.R., Scott and Farwell L.JJ.) was read by Sir Wilfrid Greene M.R. The respondents are the owners of a large freehold estate situate in a high class residential and shopping district close to Knightsbridge and comprising a number of houses, shops and flats. On May 6, 1927, by an instrument of charge and mortgage of that date they charged the estate with repayment to the Prudential Assurance Company, Ld., on November 6, 1927, of a sum of 300,000*l.* advanced to them by that company with interest at 6½ per cent. per annum reducible to 6 per cent. on punctual payment. By the same instrument the respondents assigned to the Assurance Company by way of further security a sinking fund policy for 300,000*l.*, the premiums on which they covenanted to pay. There was also a guarantee of the interest and premiums by a limited company and an individual and a provision under which the respondents by giving six months' notice could reduce the loan by any multiple of 1000*l.* not less than 10,000*l.* at any one time.

In the month of January, 1931, the respondents were desirous of paying off this mortgage and obtaining a loan for the purpose on more favourable terms. Accordingly, their managing agents, the well known firm of George Trollope & Sons, approached the Royal Liver Friendly Society by a letter dated January 28, 1931. The terms for which they asked were: (1.) that the rate of interest should not exceed 5¼ per cent. per annum; (2.) that the mortgage would not fall due in less than thirty-five years; (3.) that there should be no obligation to maintain a sinking fund; (4.) that the mortgage should be repayable in the event of a sale of the properties at six months' notice at 102½ if repaid before January 1, 1950, and thereafter at six months' notice at par. This proposal was not acceptable to the Society, and on April 21, 1931, Messrs. George Trollope & Sons asked what the Society's terms would be for a loan of 310,000*l.* at 5¼ per cent. repayable over a period of forty years. The Society agreed to grant a loan upon these terms, repayment to be made by half-yearly instalments, and ultimately on November 6, 1931, a mortgage embodying this agreement was executed in favour of the appellants, who are the trustees of the Society.

Clause 1 of the mortgage contains a covenant by the respondents to pay the principal sum of 310,000*l.* with interest at 5¼ per cent. per annum by eighty half-yearly instalments of principal and interest combined of 9308*l.* 14*s.* 3*d.* (less tax on interest) with a provision that the whole of the mortgage money outstanding should become immediately payable on any default in payment.

By clause 2 the property was demised to the appellants for a term of three thousand years with a proviso for redemption on payment of the principal money and interest " by the "instalments at the respective times and in manner specified "in the covenant " by the respondents contained in clause 1 and mortgagees' costs.

Clause 3 contained a number of usual covenants by the respondents, including covenants to repair and insure all buildings. The borrowers' statutory power of leasing was not to be exercised without the consent of the mortgagees, which was not to be unreasonably or arbitrarily withheld. The statutory powers of the mortgagees were to be exercisable on any breach by the borrowers of their covenants and also on any sale of the equity of redemption in any part of the premises without the consent of the mortgagees, which was not to be unreasonably withheld in the case of a respectable and responsible person. There were other provisions which it is not necessary to set forth, and there was also a covenant by the mortgagees to accept payment by the instalments mentioned.

On February 25, 1937, the respondents issued the writ in this action claiming to be entitled to redeem the mortgaged property on the usual notice on payment of the principal amount remaining due with interest and mortgagees' costs notwithstanding the provision in the mortgage deed whereby the mortgage moneys are made repayable only by instalments spread over the period of forty years. The ground upon which this claim was based was set out in the statement of claim and was to the effect that the provision in question "if and so far as it prevents the plaintiffs from redeeming the "said mortgage at any time upon proper payment of principal "and interest is illegal and void as a clog on their right to "redeem the said mortgage and that it renders the same "irredeemable for an undue length of time and is not capable "of being enforced against them."

At the trial before Luxmoore J. the only arguments presented on behalf of the respondents were to the effect that the provision for postponing the contractual right to redeem until the instalments had been paid was (1.) void in itself as postponing the contractual right for too long a time, or alternatively (2.) void by reason of certain other features of the mortgage deed.

On behalf of the appellants it was argued among other things that the mortgage deed was a " debenture " within the meaning of ss. 74 and 380 of the Companies Act, 1929. This argument was rejected by the learned judge. Having regard to the view which we took of the other points raised in the case, it was unnecessary for us to require argument upon it, and accordingly we express no opinion as to the correctness of Luxmoore J.'s decision in this respect.

Luxmoore J. reserved his judgment, and in the course of considering it, it occurred to him that there might be a question whether the provision for redemption at the expiration of forty years might not offend against the perpetuity rule. As this point had not been taken at the trial, he ordered the action to be restored to the list and heard argument upon it. He then reserved his judgment, which he delivered on April 13, 1938. He was of opinion that the provision in question did not offend against the perpetuity rule, but he decided in favour of the respondents upon the second of the two arguments above referred to—namely, that the postponement of the contractual right to redeem until the repayment by instalments had been effected was void by reason of certain other features of the deed, and he made the declaration which the respondents were seeking.

We will deal first with the arguments originally presented on behalf of the respondents. The first argument was that the postponement of the contractual right to redeem for forty years was void in itself, in other words, that the making of such an agreement between mortgagor and mortgagee was prohibited by a rule of equity. It was not contended that a provision in a mortgage deed making the mortgage irredeemable for a period of years is necessarily void. The argument was that such a period must be a "reasonable" one, and it was said that the period in the present case was an unreasonable one by reason merely of its length. This argument was not the one accepted by the learned judge.

Now an argument such as this requires the closest scrutiny, for, if it is correct, it means that an agreement made between two competent parties, acting under expert advice and presumably knowing their own business best, is one which the law forbids them to make upon the ground that it is not "reasonable." If we were satisfied that the rule of equity was what it is said to be, we should be bound to give effect to it. But in the absence of compelling authority we are not prepared to say that such an agreement cannot lawfully be made. A decision to that effect would, in our view, involve an unjustified interference with the freedom of business men to enter into agreements best suited to their interests and would impose upon them a test of "reasonableness" laid down by the Courts without reference to the business realities of the case.

It is important to remember what those realities were. The respondents are a private company and do not enjoy the facilities for raising money by a public issue possessed by public companies. They were the owners of a large and valuable block of property, and so far as we know they had no other assets. The property was subject to a mortgage at a high rate of interest and this mortgage was liable to be called in at any time. In these circumstances the respondents were, when the negotiations began, desirous of obtaining for themselves two advantages: (1.) a reduction in the rate of interest, (2.) the right to repay the mortgage moneys by instalments spread over a long period of years. The desirability of obtaining these terms from a business point of view is manifest, and it is not to be assumed that these

C. A.
1938
Knightsbridge Estates Trust, Ld.
v.
Byrne.

respondents were actuated by anything but pure considerations of business in seeking to obtain them. The sum involved was a very large one, and the length of the period over which the instalments were spread is to be considered with reference to this fact. In the circumstances it was the most natural thing in the world that the respondents should address themselves to a body desirous of obtaining a long term investment for its money. The resulting agreement was a commercial agreement between two important corporations experienced in such matters, and has none of the features of an oppressive bargain where the borrower is at the mercy of an unscrupulous lender. In transactions of this kind it is notorious that there is competition among the large insurance companies and other bodies having large funds to invest, and we are not prepared to view the agreement made as anything but a proper business transaction.

But it is said not only that the period of postponement must be a reasonable one, but that in judging the "reasonableness" of the period the considerations which we have mentioned cannot be regarded; that the Court is bound to judge "reasonableness" by a consideration of the terms of the mortgage deed itself and without regard to extraneous matters. In the absence of clear authority we emphatically decline to consider a question of "reasonableness" from a standpoint so unreal. To hold that the law is to tell business men what is reasonable in such circumstances and to refuse to take into account the business considerations involved, would bring the law into disrepute. Fortunately, we do not find ourselves forced to come to any such conclusion.

Mr. Stamp, when pressed as to the matters which, upon the respondents' argument, the Court might legitimately consider, upon the question of reasonableness, made a curious concession. He said that the Court might hold a longer period to be reasonable where the borrower was a body like the Corporation of the City of London with a long expectation of life than where the borrower was a private individual or a limited company which for this purpose (at any rate in the case of private companies) he treated as a mere body of individuals. This was because he said that the period of reasonableness must be judged by reference to the normal duration of human life—what age the borrower was to be assumed to be, and whether a longer period would be permissible for a borrower aged thirty than for a borrower aged sixty-five he preferred not to say. This was the extent of Mr. Stamp's concession: the fact that it was made illustrates very pointedly what appears to us to be the inadmissibility of a principle by which the test of "reasonableness" is to be so artificially circumscribed.

Assuming therefore, without in any way deciding, that the period during which the contractual right of redemption is postponed must be a "reasonable" one (a question which we will now proceed to examine), we are of opinion that the respondents have failed to establish (and the burden is on them) that there is anything unreasonable in the mere extension of the period for forty years in the circumstances of the present case. //

But in our opinion the proposition that a postponement of the contractual right of redemption is only permissible for a "reasonable" time is not well-founded. Such a postponement is not properly described as a clog on the equity of redemption, since it is concerned with the contractual right to redeem. It is indisputable that any provision which hampers redemption after the contractual date for redemption has passed will not be permitted. /Further, it is undoubtedly true to say that a right of redemption is a necessary element in a mortgage transaction, and consequently that, where the contractual right of redemption is illusory, equity will grant relief by allowing redemption. This was the point in the case of *Fairclough* v. *Swan Brewery Co.* (1) decided in the Privy Council, where in a mortgage of a lease of twenty years the contractual right to redeem was postponed until six weeks before the expiration of the lease. The following passage from the judgment explains the reason for that decision (2): "The learned counsel on behalf of the respondents admitted, "as he was bound to admit, that a mortgage cannot be

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(1) [1912] A. C. 565.

(2) Ibid. 565, 570.

"made irredeemable. That is plainly forbidden. Is there any "difference between forbidding redemption and permitting it, "if the permission be a mere pretence? Here the provision "for redemption is nugatory."

Moreover, equity may give relief against contractual terms in a mortgage transaction if they are oppressive or unconscionable, and in deciding whether or not a particular transaction falls within this category the length of time for which the contractual right to redeem is postponed may well be an important consideration. In the present case no question of this kind was or could have been raised.

But equity does not reform mortgage transactions because they are unreasonable. It is concerned to see two things—one that the essential requirements of a mortgage transaction are observed, and the other that oppressive or unconscionable terms are not enforced. Subject to this, it does not, in our opinion, interfere. The question therefore arises whether, in a case where the right of redemption is real and not illusory and there is nothing oppressive or unconscionable in the transaction, there is something in a postponement of the contractual right to redeem, such as we have in the present case, that is inconsistent with the essential requirements of a mortgage transaction? Apart from authority the answer to this question would, in our opinion, be clearly in the negative. Any other answer would place an unfortunate restriction on the liberty of contract of competent parties who are at arm's length—in the present case it would have operated to prevent the respondents obtaining financial terms which for obvious reasons they themselves considered to be most desirable. It would, moreover, lead to highly inequitable results. The remedy sought by the respondents and the only remedy which is said to be open to them is the establishment of a right to redeem at any time on the ground that the postponement of the contractual right to redeem is void. They do not and could not suggest that the contract as a contract is affected, and the result would accordingly be that whereas the respondents would have had from the first the right to redeem at any time, the appellants would have had no right to require payment otherwise than by the specified instalments. Such an outcome to a bargain entered into by business people negotiating at arm's length would indeed be unfortunate, and we should require clear authority before coming to such a conclusion.

We will now turn to the relevant authorities cited in argument by counsel for the parties. The first in order of date is *Talbot* v. *Braddill.* (1) That was a case where the plaintiff mortgaged certain property by demise at a nominal rent to secure a loan of 320*l.* with a contractual right to redeem on payment of 380*l.* at the expiration of thirty-one years after the date of the mortgage. The property consisted of lands in possession worth 15*l.* a year, a reversionary interest in land worth 17*l.* a year subject to the life interest of the mortgagor's mother, and other lands worth 8*l.* a year after a term of twenty-six years. The whole income as it came into possession would have been receivable by the mortgagee. The mother died within three years. Sir Francis North thought it an "unreasonable bargain" and allowed redemption on payment of the difference between the rents received (less the cost of lasting improvements) and the principal sum of 320*l.* with interest. This case appears to have been one in which the transaction was really unconscionable, since the mortgagor was a reversioner. The decision, in our opinion, is not based merely on the length of time for which redemption was postponed and is no authority for the proposition that such a postponement is in itself not permissible.

The next case is *Cowdry* v. *Day.* (2) There the mortgagee was a solicitor and the mortgagor was his client. Such transactions are subject to special rules of their own, and the case is of no assistance in answering the present question.

The respondents' sheet-anchor was a dictum of Sir George Jessel M.R. in *Teevan* v. *Smith.* (3) He said: "although "the law will not allow a mortgagor to be precluded from "redeeming altogether, yet he may be precluded from redeeming "for a fixed period, such as five or seven years." We cannot treat this dictum as representing a considered opinion to the effect that the contractual right of redemption may only be postponed for a period of the order mentioned where the right of redemption is a real and not an illusory one. Sir George Jessel was merely giving an example to illustrate a point in his reasoning, and he naturally chose one with regard to which no possible controversy could arise. He was not, in our opinion, asserting any such doctrine as that for which the respondents contend.

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(1) 1 Vern. 183.
(2) 1 Giff. 316.
(3) 20 Ch. D. 724, 729.

This dictum was referred to by Romer J. in *Biggs* v. *Hoddinott.* (1) In that case a mortgage to brewers was for five years certain with a "tie" during the continuance of the mortgage. Two questions arose in the case, one as to the right of the mortgagor to redeem before the expiration of the five years, the other as to the validity of the tie. Romer J. held that there was no objection to the five year period, either in itself or when taken in conjunction with the tie. He said (1): "I am of opinion that it is obviously to the advantage of both "the mortgagor and mortgagee that such a provision should be "enforced. Of course, that does not prevent the Court in a "proper case from preventing the application of the clause if "it is too large, or there are circumstances connected with the "proviso which renders it, in the opinion of the Court, unreasonable or oppressive." Here again we cannot read these observations as meaning that, in a case where there is no circumstance of oppression, a real contractual right of redemption is to be displaced merely because it is postponed for a substantial period. We do not think that the word "unreasonable" should be interpreted as meaning that the Court is to disregard the bargain made by the parties merely because it comes to the conclusion that it is an unreasonable one. A postponement of the right of redemption may be the badge of oppression, or it may be unreasonable in the sense that it renders the right of redemption illusory. We doubt whether Romer J. meant more than this.

Bradley v. *Carritt* (2) was a true case of a clog on the equity of redemption. Lord Macnaghten said (1) in reference to *Biggs* v. *Hoddinott* (2): "In the first place, it purported to "decide that a mortgage may be made irredeemable for a "reasonable period. Well, everybody knows that when money "was placed out on mortgage as an investment nothing was "more common than to make the mortgage irredeemable for "a certain limited time. It was an old and well-established "practice, and a very reasonable practice too." We do not think that this passage really assists the respondents. On the contrary, the reference to placing out money on mortgage as an investment appears to us to support the view that, where the period of the mortgage is fixed upon an investment basis and is not a cloak for something else, there is no ground for interference.

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(1) [1898] 2 Ch. 307, 311.

(2) [1903] A. C. 253.

In *Williams* v. *Morgan* (3) the period of the mortgage was fourteen years, but it does not appear to have been suggested that there was any objection to it.

Morgan v. *Jeffreys* (4) was a case in which, as appears from a copy of the mortgage with which we were furnished, the covenant was to repay the mortgage money on a date six months after the date of the mortgage with a proviso for reconveyance on such payment. This circumstance is not stated in the report, but it is for present purposes very important. The mortgage then contained a provision by which the mortgagor was precluded from paying off the debt for a period of twenty-eight years unless the mortgagee was willing to receive it earlier. The mortgage also contained a "tie"—it was a public-house mortgage and the mortgagee was a brewer—and this tie was to last during the thirty-one years. The mortgagor (who was a working miner) claimed to be entitled to redeem before the thirty-one years had elapsed, and Joyce J. held that he was entitled to do so. He relied on the length of the period, the absence of mutuality, the position of the mortgagor, the character of the stipulation in the agreement and the severity of the provisions for the benefit of the mortgagee, and held that in all the circumstances the period of twenty-eight years "exceeded all reasonable limit." In fact the provision precluding the right of the mortgagor to redeem for twenty-eight years unless the mortgagee agreed was a device intended to make the contractual right to redeem in six months inoperative, the object clearly being to enable the mortgagee to enjoy the benefit of the tie during that period. This case does not, in our opinion, assist the respondents.

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(1) [1903] A. C. 253, 259–60.
(2) [1898] 2 Ch. 307.
(3) [1906] 1 Ch. 804.
(4) [1910] 1 Ch. 620.

The last case is *Davis* v. *Symons* (1), decided by Eve J. As appears from copies of the documents supplied to us, the covenant in that case was to pay the principal moneys on February 25 then next with a corresponding proviso for redemption with regard to an endowment life policy which was included in the mortgage. There was no express proviso for redemption in the case of the land which formed part of the security, since no such proviso was required in view of s. 115 of the Law of Property Act, 1925. The deed contained a covenant by the mortgagee to allow the mortgage to remain on foot for twenty years—namely, until November 25, 1946, or until the earlier death of the mortgagor, and a covenant by the mortgagor that the whole of the principal money should remain on the security for the like period. In this respect the case resembled that of *Morgan* v. *Jeffreys*. (2) The policy was due to mature eight days before the expiration of the twenty years. There was a further charge upon the same terms which included also another policy which matured in 1942, and it was provided that, if the mortgagor survived that date, the policy moneys were to be paid to the mortgagee. The mortgage contained a covenant by the mortgagor not to sell the equity of redemption except to a responsible person. The mortgagor was held entitled to redeem before the expiration of the twenty years. Eve J. pointed to the distinction between cases where there was and those where there was not mutuality in the matter of the postponement of redemption, and expressed the view that in cases of mutuality, even if the postponement was a long one, there was no reason why the Court should allow the mortgagor to escape from his contract. The test which he applied for the purpose of this observation was whether or

(1) [1934] Ch. 442.

(2) [1910] 1 Ch. 620.

not the postponement was "extravagant and oppressive"—a test with which we do not quarrel. But he also introduced the word "reasonable," and, if that means something less than oppressive, we cannot agree with its use in this connection for reasons which already sufficiently appear. He then went on to point out that the policies were in substance irredeemable, a circumstance of doubtful materiality in view of Lord Parker's observations in *G. & C. Kreglinger* v. *New Patagonia Meat and Cold Storage Co.* (1) He also placed some reliance on the covenant by the mortgagor with regard to a sale of the equity of redemption, which he thought must "hamper the mortgagor "to an unreasonable extent." With regard to this suggested test of reasonableness it is worth pointing out that even in the case of collateral advantages extending beyond redemption which do not amount to a clog on the equity of redemption there is no rule of equity which prohibits them if they are not either (1.) unfair and unconscionable, (2.) in the nature of a penalty clogging the equity of redemption, or (3.) inconsistent with or repugnant to the contractual and equitable right to redeem: *G. & C. Kreglinger* v. *New Patagonia Meat and Cold Storage Co.* (2) In our judgment the decision in *Davis* v. *Symons* (3) can be supported on the ground that the provision for postponement of redemption was a device to fetter the right to redeem on performance of the covenant for payment on February 25 following the date of the mortgage. In so far as it is based upon the view that the Court is concerned with questions of reasonableness in such a case we respectfully dissent from it.

Luxmoore J. does not express the opinion that the postponement in the present case is to be regarded as void by reason merely of its length. He holds that the period is "having "regard to all the provisions of the deed, unreasonable." The provisions to which he refers are set out in his judgment and we need not repeat them. We find ourselves unable to take the view that the Court is entitled in such a case as the present to treat as unreasonable provisions in a mortgage deed entered into by two parties such as we have here with the assistance of competent advisers. For all the Court can know, provisions which may appear to it to be disadvantageous to the mortgagor may have been regarded by him, and correctly regarded, as of no practical consequence from a business point of view.

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(1) [1914] A. C. 25, 53.

(2) Ibid. 25, 61.

(3) [1934] Ch. 442.

In the present case during the negotiations for the loan the respondents asked for a term to be inserted enabling them to obtain the release from the security of such parts of the property as they might sell or let on long leases. They did not, however, insist on this and were willing to accept an assurance from the mortgagees upon the subject. We do not see how they can now turn round and say that the omission of such a term was unreasonable. In our opinion, if we are right in thinking that the postponement is by itself unobjectionable, it cannot be made objectionable by the presence in the mortgage deed of other provisions, unless the totality is sufficient to enable the Court to say that the contract is so oppressive or unconscionable that it ought not to be enforced in a Court of equity. If such other provisions are collateral advantages which are inadmissible upon the principles laid down by Lord Parker in the passage cited above, they will, of course, fall to be dealt with as such.

The second ground upon which the respondents endeavoured to support the judgment of the Court below was that the postponement of the contractual right to redeem for a period of forty years offended the rule against perpetuities and was therefore invalid. The learned judge decided against the respondents on this question and in our judgment rightly. The rule against perpetuities is a rule which was made to prevent the mischief arising from the attempts of settlors, testators and others to postpone the alienation of property for unduly long periods. It is not of universal application, although the cases in which the rule does apply are now well settled. The rule has never been applied to mortgages, no doubt because such transactions do not produce the mischief which the rule was intended to prevent, and in this connection it is noteworthy that the Legislature has expressly recognized the validity of long term mortgages in the power to borrow given to Local Authorities by various Acts of Parliament: see, for example, s. 198 of the Local Government Act, 1923.

C. A.
1938
KNIGHTSBRIDGE ESTATES TRUST, LD. v. BYRNE.

Under these circumstances it would not be right now for the first time to hold that the rule was applicable to mortgages, and it is therefore unnecessary for us to express any opinion upon the question whether, if the rule applied, the provisions of this mortgage would offend it.

The appeal is allowed with costs here and below.

Appeal allowed.

Solicitors for appellants: *Sharpe, Pritchard & Co., for Bremner, Sons & Corlett, Liverpool.*

Solicitors for respondents: *Clifford-Turner & Co.*

P. J. B.

Applied. Re GEORGE. [1949] 1 Ch. 154

In re VAUX.

NICHOLSON *v.* VAUX.

[1927. V. 473.]

C. A.

1938

Oct. 19, 20;
Nov. 11;
Dec. 5, 6.

Will—Construction—Rule against perpetuities—Residuary gift—Validity—Rule against double portions—Trustees' power to appoint residuary estate among testator's children.

A testator by his will gave legacies of the value of 20,000*l.* to each of his two daughters. By clause 11 of his will he provided that his trustees should hold his residuary trust fund "Upon "trust to pay and apply both the income and capital thereof in "such shares and proportions as they may in their absolute and "uncontrolled discretion think fit to or for the benefit of all or "any one or more of my children or the issue of any deceased "child of mine And I declare that my trustees may from time to "time within the period of twenty-one years from my decease "accumulate the surplus of any income of my residuary trust fund "not paid or applied under the preceding clause of this my will by "investing the same and the resulting income thereof to the "intent that the accumulations shall be added to the residuary "trust fund and follow the destination thereof with liberty "nevertheless for the trustees at any time or times to resort to "the accumulations of any preceding year or years and apply "the same as part of my residuary trust fund."

Clause 12 of the will provided that "Having the fullest confidence "in my trustees I hereby authorise and empower them to deal with "the capital and income of my residuary trust fund and pay "away and deal with the same in all respects for the benefit "and provision of my children or grandchildren as they may think "best or most expedient and to act in all respects as I could "have done if living save only that all such dealings with the "residuary trust fund and the income and accumulations thereof "shall be within the limitations prescribed by law." He subsequently settled 2000 shares in a certain company on each of his four children:—

Held (1.), that, while the trusts declared in clause 11 of the will infringed the rule against perpetuities and were void, the power conferred by clause 12 was valid by reason of the saving words at the conclusion of the clause. These words were equivalent to a direction that the beneficial interest vested in a beneficiary by any exercise of the power was to vest in the beneficiary within the period of a life or lives in being and twenty-one years afterwards, and imported that any appointment made under the clause must be made at a date which fell within that period;

(2.) that, in view of the fact that the testator left the

C. A.

1938

VAUX,
In re.
NICHOLSON
v.
VAUX.

distribution of his residuary estate in the hands of his trustees, the rule against double portions, either in regard to the bequest of 20,000*l.* to each of his daughters or their shares in the subsequent settlement, did not apply.

Decision of Simonds J. ([1938] Ch. 581) on both points reversed.

APPEAL from a decision of Simonds J. (1)

The testator, Colonel Ernest Vaux, made his will dated November 27, 1919, and thereby devised and bequeathed his residuary real and personal estate to his trustees upon trust to pay the income thereof to his wife during her life or her widowhood, and in the event of her re-marriage she was to receive an annuity of 500*l.* a year. From and after the death or re-marriage of his wife and subject to the said annuity the trustees were to hold the residuary trust fund upon trust to set aside and appropriate for each of his daughters who should be living at the time of his death, investments of the value of 20,000*l.*, and these legacies of 20,000*l.* were then settled on the usual trusts. Subject to the provision of these legacies the trustees were to stand possessed of the residuary estate upon trusts declared in clause 11, which was as follows: "And as to the rest residue and remainder of my residuary "trust fund I declare that my trustees shall hold the same "upon trust to pay and apply both the income and capital "thereof in such shares and proportions as they may in their "absolute and uncontrolled discretion think fit to or for the "benefit of all or any one or more of my children or the issue "of any deceased child of mine And I declare that my trustees "may from time to time within the period of 21 years from "my decease accumulate the surplus of any income of my "residuary trust fund not paid or applied under the preceding "clause of this my will by investing the same and the resulting "income thereof to the intent that the accumulations shall be "added to the residuary trust fund and follow the destination "thereof with liberty nevertheless for the trustees at any "time or times to resort to the accumulations of any preceding "year or years and apply the same as part of my residuary "trust fund."

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(1) [1938] Ch. 581.

C. A.
1938
VAUX,
In re.
NICHOLSON
v.
VAUX.

This was followed by clause 12, which was in the following terms: "Having the fullest confidence in my trustees I "hereby authorise and empower them to deal with the capital "and income of my residuary trust fund and pay away and "deal with the same in all respects for the benefit and provision "of my children or grandchildren as they may think best or "most expedient and to act in all respects as I could have "done if living save only that all such dealings with the "residuary trust fund and the income and accumulations "thereof shall be within the limitations prescribed by law."

Then followed clauses expressing certain "intentions," but without imposing any legal obligation to give effect to them.

On September 9, 1924, the testator settled 8000 6 per cent. preference shares of 5*l.* each in C. Vaux & Sons, Ld. (a private company) upon his four children, two sons and two daughters, with cross-remainders between them. Each daughter by this settlement had settled upon her 2000 shares of the value of over 10,000*l.* The testator died on November 25, 1925, and his will was proved by the executors and trustees thereof in 1926. The summons was taken out in 1927 to decide questions arising in the administration of the testator's estate, and having stood over generally had been amended to raise certain questions of construction arising on the will and the settlement of 1924.

Simonds J. decided (1.) that the residuary gift in the will infringed the rule against perpetuities, and was void, and therefore that the testator died intestate as to the residue of his estate; (2.) that the legacies of 20,000*l.* each to the testator's daughters and the settlement on each of them of 2000 shares of the company were portions so as to bring in the rule against double portions; and (3.) that the rule against double portions applied in the case of a partial intestacy, but that the rule did not apply for ascertaining the share of the testator's widow in the ultimate residue of his estate but only for ascertaining the shares therein of the testator's children.

There were three appeals from this decision. The first appeal, which was argued separately, was by the defendant

Peter Vaux, the testator's surviving son, against the decision in regard to the rule against perpetuities. The appeal was argued on October 19 and 20 and judgment given on November 11, 1938.

Harold Christie K.C. and *J. G. Strangman* for the appellant. Clause 11 and clause 12 of the will must be read as one clause, and the discretionary trusts declared in clause 11 are, therefore, rendered valid by the concluding words of clause 12, which provide that "all such dealings with the residuary trust fund "and the income and accumulations thereof shall be within "the limitations prescribed by law." That clause 11 and clause 12 must be read together is shown by the word "accumulations" in those concluding words of clause 12, for accumulations are only provided for in clause 11.

There remains the question whether the concluding words of clause 12 are sufficiently precise. The limitations prescribed by law are a life or lives in being and twenty-one years afterwards. It is said that there is no way of identifying which lives in being are to be taken into account; but the testator has not travelled in his residuary gift outside his descendants, so that the lives in being must be the children of the testator living at his death: compare *Pownell* v. *Graham*. (1) The period therefore is the lives of the testator's children living at his death and twenty-one years afterwards. There is no justification for resorting to a fanciful application of the rule against perpetuities such as the descendants of Queen Victoria living at the testator's death and twenty-one years afterwards. It is the duty of the Court to give effect to the testator's meaning, if possible.

Should it be held, however, that clause 11 and clause 12 are independent clauses so that clause 11 is void, clause 12 will stand by itself and empower the trustees to make a settlement for the benefit of the testator's children and grandchildren.

[CLAUSON L.J. May it not be that the power conferred on the trustees in clause 12 refers to the named trustees in view of the testator's expression of his confidence in them?]

(1) (1863) 33 Beav. 242.

That is not a sufficient justification for construing "my trustees" in a sense other than it bears in the preceding and subsequent clauses of the will.

Norman Daynes K.C. and *E. M. Winterbotham* for the testator's widow. The testator's attempt to dispose of his property in an unusual way failed. Clause 11 and clause 12 must be read independently. Clause 12 gives powers going beyond anything in clause 11—namely, to grant a loan or make a settlement. The word "dealings" in the latter part of clause 12 is appropriate to what is authorized by clause 12 and not to clause 11. Clause 11 is therefore void and clause 12 is also void, because, if dependent on clause 11, it grows out of the invalid trust in clause 11 and, if independent of clause 11, it practically gives the trustees power to make a new will for the testator. That is a thing the law will not permit: *In re Neave.* (1) Further, the context does not admit of "trustees" in clause 12 meaning anything other than those named by the testator: *Cole* v. *Wade* (2) and *In re Smith* (3), where the earlier case is discussed.

Again, there is no justification for assuming that the reference in clause 12 to the limitations permitted by law means that the lives in being referred to in the residuary bequest are those that are to be taken into account. The power conferred on the trustees is prima facie void for remoteness, and the concluding words of clause 12 are not clear enough as to the limitation imposed to make it valid: compare *In re de Sommery.* (4) All they really meant was that the testator wished the powers to extend to the last moment permitted by law, that is, for some such period as the life or lives of Queen Victoria's descendants living at the testator's death and twenty-one years afterwards.

Further, in ascertaining whether a power has been validly exercised, regard must be had to the state of facts when it is exercised: *In re Thompson* (5); *In re Paul.* (6) The result is that the provision contained in the concluding words of

(1) [1938] Ch. 793, 798.
(2) (1807) 16 Ves. 27.
(3) [1904] 1 Ch. 139.
(4) [1912] 2 Ch. 622.
(5) [1906] 2 Ch. 199.
(6) [1921] 2 Ch. 1.

clause 12 is void for uncertainty. It is true that it is unnecessary for a testator to specify the limitations for the purpose of the rule against perpetuities when a special power is exercisable only by a person living at the death. But if on the true view of clause 12 the power is given to a succession of persons, namely, the trustees for the time being, it is void ab initio, because the persons to exercise the power may exercise it after the expiry of the period permitted by the rule against perpetuities.

[SIR WILFRID GREENE M.R. Do not the concluding words of clause 12 exclude the possibility of the power being exercised outside the permissible limit ?]

In any case the power is void for uncertainty: *In re Moore.* (1)

Grant K.C. and *Leonard Stone* for the testator's two daughters. Clause 12 is bad either as a limitation following a void limitation or as a power intended to carry into effect the void trusts of clause 11.

Danckwerts for the plaintiffs.

J. G. Strangman replied.

Cur. adv. vult.

1938. Nov. 11. CLAUSON L.J. read the judgment of the Court (SIR WILFRID GREENE M.R., SCOTT and CLAUSON L.JJ.). Colonel Ernest Vaux died on November 25, 1925, leaving a widow, two sons, and two daughters. All the children attained twenty-one. One son, Ernest, died in the year 1936 after attaining twenty-one. The widow and the other three children are living.

By his will dated November 27, 1919, the testator appointed Cuthbert Vaux, Frank Nicholson, and the widow to be his executors and trustees, and devised his real estate and the residue of his personal estate to his trustees upon the usual trusts for sale, conversion, and investment. He gave his wife a life interest liable to be cut down on her re-marriage, an event which has not occurred, and he directed the

(1) [1901] 1 Ch. 936.

appropriation of two sums of 20,000*l.* for each of his daughters; and he then proceeded to dispose of the residue of his residuary trust funds in terms which are contained in clauses 11 and 12 of his will.

The present trustees of the will are the two trustees named therein together with Frank Douglas Nicholson.

The present appeal is from an order of Simonds J. of March 16, 1938, declaring that the residuary trust fund is undisposed of and devolves as upon an intestacy, and that decision is based upon the terms of clauses 11 and 12 of the will.

The provisions of clause 11 of the will are as follows: [His Lordship read the clause.]

It appears to have been admitted before the learned judge that the provisions of clause 11 must be treated as void, and he so held, and we agree with that decision. In view of the problems arising from the following clause in the will it is desirable to consider precisely upon what grounds clause 11 of the will must be treated as void. It is to be observed that the trusts declared are discretionary trusts to be executed by "my trustees," i.e., as appears from the definition clause at the beginning of the will, the trustees or trustee for the time being of the will whether original or substituted, and, accordingly, there is no such limitation on the period within which the discretion is to be exercised as there would have been had the discretion been vested in named persons and in them alone. The trust is accordingly one under which, according to its terms, an interest can be created at a date more than twenty-one years after any life in being at the death of the testator. It follows that such a trust must be bad. The matter may be viewed in two alternative aspects. First, if the clause be regarded as creating a trust, it creates beneficial interests in the persons named, scilicet, the testator's children and issue, such interests not being absolute interests but contingent both as to existence and as to extent upon the exercise of the trustees' discretion. If as a matter of construction a discretion may be exercised more than twenty-one years after the termination of any life in being at the creation of the interest, no interest created under the discretion can fail to infringe the rule against perpetuities, since it cannot be predicated of the interest created by the testator's will (i.e., an interest contingent on the exercise of the trustees' discretion) that it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest, scilicet, at the death of the testator. Secondly, if the clause be regarded as creating a power in the trustees for the time being of the will to appoint the fund among the testator's children or the issue of any deceased child of his, the case is one of a power which according to its terms can be exercised beyond the limits of the rule against perpetuities and under which an appointment can be made which would be too remote. It is well settled that the fact that within the terms of the power an appointment can be made which would be too remote does not render the power void if it is one which cannot be exercised beyond the limits of the rule against perpetuities, but it is equally well settled that a power cannot be held to be valid if according to its terms it can be exercised by persons not necessarily ascertainable within the limits of the rule against perpetuities. This was held by this Court in *In re Hargreaves* (1), a decision which is binding on us and is, in our judgment, unquestionably in accordance with principle.

Clause 12, which follows, is in the following terms: [His Lordship read the clause.]

The learned judge took the view that this clause could not be read as limiting or cutting down clause 11 so as to import into the trust conferred by clause 11 a provision that any dealings with the residuary trust fund under that clause should be within the limits prescribed by the rule against perpetuities; and so far we do not see our way to differ from him. He, however, took the view that clause 12 merely added a particular authority falling within the larger ambit of the trust created by clause 11 and that it could not be construed as an independent effective provision. Here we part company with the learned judge on the question of construction. The two clauses are inartistically framed, but we are satisfied that

(1) (1890) 43 Ch. D. 401.

clause 12 is a provision which ought to be read as independent of and additional to clause 11, and, accordingly, that its effectiveness in creating a valid trust or a valid power can properly be tested by a consideration of its language as an independent clause. It is to be observed in this connection that the class of beneficiaries mentioned in clause 12, namely, children and grandchildren, is a different class to that mentioned in clause 11, and that some of the beneficiaries mentioned in clause 12, namely, grandchildren, might from time to time (that is to say, during the lifetime of their parent) be outside the class of beneficiaries mentioned in clause 11.

It may be suggested in the first place that clause 12, differing in this respect from clause 11, does not confer authority on the trustees for the time being of the will, but merely on the trustees named in the will. It is true that the words " having the fullest confidence in my trustees " might be held to indicate confidence in particular ascertained persons and might afford a context sufficient to exclude the definition clause and to confine the meaning of the phrase " my trustees " to the actual persons named in the will. In view of the use of the phrase " my trustees " in the preceding clause 11 and the subsequent clauses 13 and 14, we cannot accept this argument, and we feel bound to construe clause 12 as conferring authority and power on the trustees for the time being of the will.

The learned judge, though of opinion that clause 12 could not be treated as a provision independent of clause 11, nevertheless on the contrary assumption indicated his view that (*a*) a power exercisable by the trustees for the time being was void as being capable of being exercised beyond a period of lives living at the testator's death and twenty-one years thereafter and (*b*) that this defect was not cured by the words " save only that all such dealings with the residuary "trust funds and the income and accumulations thereof shall "be within the limitations prescribed by law." We agree, as we have already intimated, with the view that apart from the saving words the power given to the trustees by this clause must, as being given to the trustees for the time being of the will, be treated as invalid for remoteness; but the question arises whether on the construction of the clause as a whole, including the saving words, the power is not confined to a period which must necessarily terminate within the period of a life or lives in being at the testator's death and twenty-one years afterwards. It is to be observed that the objects of the power are confined to the class of children and grandchildren of the testator; the class does not extend to issue more remote than a grandchild. The possible beneficiaries must necessarily be in existence within the period of lives in being at the testator's death; but it is true that, apart from the saving words, the power according to its terms is exercisable within the lifetime of any grandchild, and so is exercisable during the whole of the life of a grandchild born just before the death of the testator's last surviving child, and, accordingly, if such a grandchild lives more than twenty-one years, during a period which may conceivably extend beyond any life or lives in being at the testator's death and twenty-one years thereafter.

We turn now to the saving words. The word "dealings," whether or not it covers the act of exercise by the trustees of the power, must certainly be construed to cover the beneficial interest vested in the beneficiary in whose favour the power is exercised. The words are in our judgment equivalent to a direction that the beneficial interest vested in the beneficiary by any exercise of the power is to vest in the beneficiary, if at all, within the period of a life or lives in being at the death of the testator and twenty-one years thereafter.

In the case of a special power such as this the validity of the interest appointed thereunder must be tested by asking the question whether if the interest had been conferred by the testator in his will it would have been obnoxious to the rule against perpetuities. The saving words appear to us to be the equivalent of a proviso that no interest must be appointed to a beneficiary under this power which, if given by the testator in his will, would have been obnoxious to the rule against perpetuities. Let it be assumed that the saving words have been thus written out at length. The saving words would, if thus written out, necessarily seem to import that any appointment to be made under the clause must be made at a date which in fact falls within the period of a life or lives in being at the testator's death and twenty-one years afterwards, since the act of appointment must take place either at the moment at which the interest vests (if the appointment takes the form of an immediate gift) or at some date before the moment of vesting, if the appointment takes the form of an appointment to take effect on a future contingency. The matter may be made clearer by an example. Assume that at a date more than twenty-one years after the death of the last surviving child of the testator the then trustees in, let as say, the year 2070 exercise the power by handing 1000*l*. out of the fund to a then living grandchild of the testator. It may be admitted that the mere exercise of the power at that time could not be shown to be invalid, since it may then be impossible to prove that none of the human beings living at the testator's death are surviving or were surviving twenty-one years before. The interest appointed will, however, plainly be invalidly appointed. For if the testator had by his will directed his trustees to hand 1000*l*. to some or one of his grandchildren living in the year 2070, such a direction would have been invalid since it could not, as at the death of the testator in 1925, have been possible to predicate that the year 2070 (being the time when the interest would vest) would necessarily fall within the period of a life or lives in being at the testator's death and twenty-one years thereafter. The truth is that if the words of saving, on their true construction, prevent the power being exercised so as to create an interest obnoxious to the rule against perpetuities, the result must necessarily be to restrict the exercise of the power to a period which will fall within the limits of the rule.

There was, however, a further point raised in argument with which it is necessary to deal. It was suggested that the saving words were ineffective because they were too vague and uncertain. The limits of the rule cannot, so the argument ran, be regarded as something "in vacuo." They must be construed by reference to some defined lives; otherwise the limits of the rule are uncertain. Reference was made to *In re Moore* (1), where Joyce J. held that a gift to continue until the "period of twenty-one years from the death of the last "survivor of all persons who shall be living at my death," was void for uncertainty. The question whether the gift was void as a perpetuity was left undecided. It is no doubt necessary to consider whether the saving words, restricting as they do, in our judgment, the period during which the power created by clause 12 is exercisable, may not be inoperative as imposing an uncertain and for that reason void restriction. In our judgment the saving words are not void for uncertainty in the context in which they appear in this will. The saving words relate to the nature of the interest to be created and have the effect of restricting the period for the exercise of the power by reference to the nature of the interest which it is permissible to appoint. The validity of the interest can be tested without any element of uncertainty being brought into the test: for the test is whether, if the interest as appointed had been given by the testator's will, it could have been predicated of it at the date of the testator's death that it must necessarily vest, if at all, within a period of a life or lives then in being and twenty-one years after. It is thus possible, without any uncertainty, to test whether the interest vests within the permissible period. As we have pointed out above, the power which creates such an interest must be exercised in creating that interest either at the moment at which the interest vests (which will be the case of a present immediate payment or gift in exercise of the power) or at some earlier date (as in the case of a disposition to take effect in the future). Accordingly the restriction in regard to the time of the exercise of this power, having regard to the operation of the saving words upon the interest to be created, is always capable of being effectively tested; and the possibility of any uncertainty is thus eliminated.

We have only to add that it was ingeniously suggested in argument by Mr. Winterbotham that support for the argument against the validity of the power was to be found in the decision of Joyce J. in *In re Thompson.* (1) It is true that that case illustrates the principle that while the validity in respect of perpetuity of an interest appointed in exercise of a special power is to be tested by reading it into the document creating the power, care must be taken, where the document exercising the power is an ambulatory document, e.g., a will, to read in the gift in the form in which it in fact operates when the ambulatory document becomes effective. The matter is treated of at length in sections 523d and 523e of Gray on the Rule against Perpetuities, 3rd ed. There is, however, in the present case no question of the exercise of a power by an ambulatory document and nothing in the case cited appears to us to throw any light on the present case.

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(1) [1901] 1 Ch. 936.

For these reasons we propose to declare that clause 12 of the will according to its true construction confers a valid power upon the trustees for the time being of the will to create any such interests in favour of children and grandchildren of the testator as, if created by the testator's will, would necessarily have vested if at all not later than twenty-one years after the expiration of some life in being at the testator's death.

Appeal allowed.

H. C. G.

The appeal by the two daughters of the testator against the decision of Simonds J. as to double portions came on for hearing on December 5.

Alexander Grant K.C. and *Leonard Stone* for the appellants. The residuary gift is not a gift to any of the children absolutely, but depends upon certain conditions being fulfilled, so therefore the rule against double portions does not arise. That rule is dealt with best in *In re Lacon.* (2)

All the children have an interest in the residuary estate. The testator leaves the disposition of his residuary estate to his trustees. They can give the whole of it to his daughters

(1) [1906] 2 Ch. 199.

(2) [1891] 2 Ch. 482.

or to his sons. What he did in 1924 could not have been intended to anticipate the effects of his will. There is no real gift in the will to the sons. The gifts here produce no inequality: *In re Scott.* (1) Where the gift inter vivos produces equality, the rule cannot arise. This is not a case which comes within the doctrine at all.

Harold Christie K.C. and *J. G. Strangman* for the testator's surviving son. The doctrine is founded on the moral obligation of a father to provide for his children: *Ex parte Pye.* (2) It is not a question of equality at all. What must be looked at is what the settlor was doing at the date of the settlement. If the fact of equality was to rebut the presumption, that was sufficient: *In re Scott.* (1) Unless the rule is applied here, the daughters would receive 20,000*l.* more than the sons if both had survived.

Norman Daynes K.C. and *E. M. Winterbotham* for the testator's widow, who was also administratrix of a deceased son. If the sons misbehaved themselves, the trustees could give all the residuary estate to the daughters.

[SIR WILFRID GREENE M.R. If the whole of the residuary estate is left to trustees with power to appoint as they think fit among the four children, are the appointments they make portions?]

Yes. Ademption does not affect the power of appointment.

SIR WILFRID GREENE M.R. We shall not need to call upon you, Mr. Grant.

This is an appeal from a judgment of Simonds J. upon an originating summons, and the question with which we now have to deal is a question of double portions. In a previous judgment upon an appeal from another part of Simonds J.'s decision we reversed the order that he made, whereby in construing the will of the testator he held that the provisions in clauses 11 and 12 of the will, where the testator deals with his residuary estate, were void for perpetuity. This Court held that, although the provisions

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(1) [1903] 1 Ch. 1.

(2) (1811) 18 Ves. 140; 2 Wh. & T. L. C., 9th ed., 314.

C. A.
1938

VAUX,
In re.
NICHOLSON
v.
VAUX.

Sir Wilfrid Greene M.R.

in clause 11 were void, clause 12 confers a valid power upon the trustees for the time being of the will to create any such interests in favour of children and grandchildren of the testator as, if created by the testator's will, would necessarily have vested, if at all, not later than twenty-one years after the expiration of some life in being at the testator's death.

The present question arises in this way: Under his will dated November 27, 1919, the testator bequeathed two legacies out of his residue to trustees upon trust for his two daughters. The trusts declared were trusts in favour of the daughters for life and after their death for their children and remoter issue as they should appoint, and in default of appointment to the children of the daughters attaining the age of twenty-one. If no child attained the age of twenty-one, the legacy of 20,000*l.* was to fall into residue. Subject to these legacies, the trusts of the residuary trust fund are those which we have already declared in our previous judgment, that is to say, the trustees have a power to appoint for the benefit of children or grandchildren of the testator, subject to the appointment not offending against the rule against perpetuities. The testator had four children, two sons and two daughters. One son is dead, the other son and the two daughters are still alive, but none of them have children. The power which we have held the trustees to possess under clause 12 has not been exercised.

The question of double portions arises in these circumstances. The will, as I have said, was dated November 27, 1919. On September 9, 1924, the testator executed a voluntary settlement. By that document he declared certain trusts of 8000 6 per cent. preference shares of 5*l.* each in a private company, Messrs. C. Vaux & Sons, Ld., which he had transferred to trustees. The trustees were to divide those shares into four equal parts, and to hold one of such parts upon certain trusts under which his son Ernest was interested, another part upon similar trusts in which his son Peter was interested, and the other two-fourths upon trusts in which his daughters respectively were interested. The trust in favour of Ernest and the corresponding trust in favour of Peter were discretionary trusts until those children should attain the age of thirty years, and on their attaining the age of thirty years, the income was to be paid to the son during the life of the settlor, and after the death of the settlor the capital went to the son with a power to appoint in certain circumstances to a surviving wife or to any children in the case where a son died under thirty. I need not give more details of those trusts. In the case of the daughters, there was a discretionary power to provide income for maintenance during their minority. Upon their attaining their majority they were to have the income for life with power to appoint an annual sum to a surviving husband, and after their death for the children of the daughters as they should appoint, and in default, for the children attaining twenty-one equally. There was a cross-gift under which in the event of the decease of any child of the settlor without leaving any child or children who should attain a vested interest in the share of such child settled in his or her favour, the share of such deceased child was to accrue to the other or others of the settlor's children and to be held upon the trusts of their original shares.

The testator died on November 25, 1925. It is said on behalf of the surviving son and the widow, that the rule against double portions applies in relation to the 20,000*l.* legacies in favour of the daughters given by the will and the benefits which they took under the settlement of December 9, 1924.

The way in which the matter proceeded before Simonds J. was this: He dealt, first of all, with the question whether or not those two legacies and the shares which were settled upon them under the settlement were portions. He then dealt with the question whether or not the residuary gift infringed the rule against perpetuities, and, as I have said, he held that it did so, with the result that there was a partial intestacy, the testator dying intestate as to the residue of his estate. On that matter the learned judge reserved his judgment, and after he delivered it the question was argued whether the rule against double portions applied to the case of a partial intestacy and, further, whether it applied for the benefit of the widow or only for the benefit of the children. The learned judge held that the rule applied to the present case notwithstanding that it was a case of partial intestacy, but that it did not apply to the benefit of the widow. The only matter that has been argued before us is the question whether the rule applies at all. If we had come to the conclusion that it did apply, the two further questions would have arisen, in respect of each of which the parties interested appeal—namely, whether it applies in the case of a partial intestacy, as may be the case under the will, and whether the widow can be benefited by it. I say there may be a case of partial intestacy for this reason, that, if the trustees do not exercise the power of appointment which we have held that they possess, and I must not be taken as expressing a final opinion upon this point, which has not been argued, there will presumably be an intestacy; but having regard to the conclusion to which we have come upon the initial question as to whether or not the rule against double portions comes into operation in this case, it was not necessary to hear argument upon those matters.

The rule against double portions rests upon two hypotheses: first of all, that under the will the testator has provided a portion and, secondly, that by the gift inter vivos which is said to operate in ademption of that portion either wholly or pro tanto, he has again conferred a portion. The conception is that the testator having in his will given to his children that portion of the estate which he decides to give to them, when after making his will he confers upon a child a gift of such a nature as to amount to a portion, then he is not to be presumed to have intended that that child should have both, the gift inter vivos being taken as being on account of the portion given by the will. When the word "portion" is used in reference to the gift inter vivos, it has a qualitative significance, in this sense, that it is not every gift inter vivos that will cause the rule to come into operation. If a testator gives to a child as pure bounty and by way merely of a present a sum of money, that will not have the character to cause the rule to come into operation. Similarly there may be various reasons why the testator should give property to a child. He may wish to free him from some embarrassment, or something of that kind. In cases of that sort upon the facts a gift may not be a portion at all, in which case, of course, the rule does not apply. In the present case the learned judge has held that the gift to the daughters under the will and the gifts to them under the settlement were equally in their nature portions. It is to be observed that the gift under the will is not in the form of a definite and final apportionment of the estate among the children, because, as we have held, and indeed, as the testator intended, according to the language that he used without reference to the rule against perpetuities, the power of deciding how much of his estate should go to each child was vested by him in his trustees. The daughters get as a minimum settled legacies of 20,000*l*. each. Subject to that, the trustees are empowered to distribute the residuary estate among the four children in whatever manner and whatever shares they think proper. They could accordingly give the whole to one daughter or to one son, or they could divide the whole among the two daughters, or among the two sons, or among any three, or the whole four of the children in whatever proportions they thought right. Accordingly, the case is not one where the testator has himself finally decided what share of his estate each child was to have. The importance of that consideration will appear later, but I am not prepared to say that for the purpose of the first hypothesis, namely, that the will must provide portions, the present will does not so provide. He makes provision for dividing up his estate, and the fact that that is to be done by the trustees and not by himself does not, I think, mean that the benefits which the children ultimately may get are not to be treated as portions.

When I turn to the settlement, different considerations may well apply. The learned judge held that under the settlement the benefits conferred were portions. I say different considerations may apply, for this reason, that the benefits conferred by the settlement, on the face of the document, were benefits conferred upon all the children in equal amounts. The trusts are not the same, but substantially each child obtains a benefit in an equal amount of shares, and there are the cross-gifts to which I have referred; but it is not necessary to investigate that question further, because I am prepared to assume for the purposes of this judgment that the true nature of the provision made by that settlement was that the benefits conferred were portions. I will assume, therefore, that the two hypotheses upon which the application of the rule rests are satisfied in the present case. That, however, is only the beginning of the inquiry, because although, when those two hypotheses are satisfied, there is a presumption against double portions, that presumption can be rebutted if, upon consideration of all the circumstances of the case, the intention to satisfy the portion in the will by means of the portion given inter vivos is negatived. In that inquiry various matters of evidence can be looked at and, of course, what is particularly important, the very nature of the two provisions themselves has to be examined. In the present case, in order to ascertain what intention has to be ascribed to this testator, we must examine the situation as it existed at the date when the settlement was executed, because it is at that date he is presumed to form that intention against double portions, which brings the rule into operation. At that date the testator had made a will under which, as I have said, he had not himself decided finally upon the shares of the estate which each child was to have. He had left it to his trustees so to arrange the disposition of his residue that although they could not diminish the interests of the daughters under the will below the 20,000*l.*, they were at liberty to increase this by as much as in the exercise of their discretion they thought fit. Accordingly, he must be taken to have contemplated that the trustees might, in the exercise of their discretion, confer upon the daughters a much larger interest, or might have appointed the entirety of the residue to one daughter, as I have said.

I should here refer to an argument which was addressed to us by Mr. Daynes as to what, under the will, was to be regarded as a portion. He argued that in the case of the daughters the only benefaction which could properly be described as a portion was the gift of the 20,000*l.* settled legacy, and that such interest, if any, as they might take under a distribution by the trustees, ought not to be regarded as their portion, or part of their portion. On the other hand, in the case of the sons, he admitted, and I think was constrained to admit, that anything that they might take under a distribution by the trustees would be a portion. The reason why he drew that distinction was that in certain provisions of the will, which are of a purely precatory nature, the testator expresses his view as to what properly ought to be done in the sense that he expects and hopes that his residue will be appointed to his sons. That does not alter the legal position at all, because the trustees undoubtedly have power to cut out both, or either, of the sons and to give the whole to the daughters. I myself am unable to regard the share, if any, of residue which a daughter gets as in any different position in this respect to that of the share, if any, of residue which a son may get. If what a son gets is a portion, in my view, what a daughter gets ultimately must also be regarded as a portion. As will be seen later, even if that view be wrong, my conclusion on the question before us would be the same.

The testator having in mind the provisions of his will, and knowing the powers which he has conferred upon his trustees, on September 9, 1924, vests in the trustees of the settlement shares which, if he had not so vested them, and if he had died without parting with them, would have formed part of the residue of his estate. There are two things to notice about that disposition. The first is that all four children benefit under it. The other is that there is, as I have said, a cross-gift among the children. It is those circumstances which made me say in an earlier part of this judgment that other considerations may well apply to this document in dealing with the question whether or not the benefits conferred are truly in the nature of portions. However, assuming that they are, it is, nevertheless, important to bear in mind those two circumstances when one comes to see whether the presumption against double portions is rebutted. The crucial fact, to my mind, lies in this: in the ordinary simple case of double portions the testator has made a definite provision in his will and a definite provision for a child inter vivos. In such a case no difficulty arises, but in the present case the testator has not made any such definite provision in his will, and he has left it to his trustees (as I have said, I am afraid, more than once) to distribute the residue of his estate. The daughters legacies are minima and not maxima. In those circumstances, is it possible to impute to this testator an intention that the 20,000*l.* legacies should be pro tanto adeemed? In my opinion, it is not possible to impute such an intention, and the circumstances and nature of the gift are such as to rebut any presumption which otherwise would arise. The matter may, I think, be tested in this way. I will take certain figures in order to test the position. The shares, I may assume, were worth par, which would make each child's block of shares under the settlement worth 10,000*l.* Each daughter gets under the will a legacy of 20,000*l.* Suppose the trustees in exercise of their discretion under the will give the entirety to the sons. According to the argument, the daughters' legacies would be adeemed to the extent of 10,000*l.* by the operation of the will. However, supposing the trustees in the exercise of their power give 20,000*l.* to each daughter. The position will then be that the legacy will be adeemed to the extent of 10,000*l.*, but the appointment of the 20,000*l.* will not be affected, because, according to the argument, that is not a portion. The circumstance, therefore, that the trustees, although they cannot reduce the daughters' interest below the minimum of 20,000*l.*, can add to it in any way they please, appears to me to indicate that the testator was quite clearly intending that the distribution of his estate should be in the hands of his trustees, and that the rule should not operate.

I have said that, even if the argument was well founded that any sum appointed to the daughters should not be treated as part of their portion, the same result would follow. My reason for so saying may be explained quite shortly. Let me assume that the argument is right. The position

C. A.
1938
VAUX,
In re.
NICHOLSON
v.
VAUX.
Sir Wilfrid Greene M.R.

would be that any sum appointed to a son was his portion. If the rule against double portions applies as against the daughters, it must apply equally as against the sons, and each son must be treated as having received under the settlement an advance of 10,000*l.* against his portion under the will. Now let me suppose that the trustees in exercise of their power of appointment appoint 10,000*l.* out of residue to a son. The effect of that will be, upon the argument put before us, that that appointment will be entirely inoperative, because it would then be said against the appointee that he had already received 10,000*l.* in respect of his portion by reason of the interest conferred upon him by the settlement and that he could not receive that 10,000*l.* again under the appointment. Similarly, if the appointment by the trustees was not 10,000*l.*, but 20,000*l.*, the appointment would be inoperative to the extent of 10,000*l.* First of all, no authority has been cited to us in which the rule against double portions has been held to operate in a case where there is in the will a special power of appointment among the children. It seems to me that in the present case the rule could not possibly operate, because it would have the effect of cutting down the trustees' power of appointment in the way that I have mentioned. In other words, the testator, having in his will committed the distribution of his residuary estate to the discretion of his trustees, by act inter vivos must be taken to have intended pro tanto to cut down the operation of that power. Not only is there no authority in support of such a proposition, but it seems to me to be contrary to the whole theory on which the rule against double portions rests. Proceeding, therefore, still upon the hypothesis that Mr. Daynes is right in saying that the daughters' portions consist of the 20,000*l.* legacies only, I note that the rule against double portions cannot, if I am right in what I have just said, operate as against the sons, and in such a case as the example I have taken, in my judgment, the son would be entitled to claim, not merely the 10,000*l.* given to him by the settlement, but the 10,000*l.* appointed to him by the trustees. If the rule against double portions cannot apply in the case of the sons, in my judgment, it cannot apply in the case of the daughters, even assuming the correctness of Mr. Daynes' suggestion. The rule against double portions is one intended to provide as between the children for the presumed intention of the testator, and it seems to me quite impossible to presume that this testator was intending that in the case of the daughters the power of appointment in the trustees was to be effective, and in the case of the sons, was not; or putting it in another way, that the testator cannot have intended that the daughters' legacies should be subject to the rule and that any sum appointed to the sons should not. There must be uniformity of treatment of all the children, and it is impossible to suppose that the testator intended anything else. Therefore, upon either view as to the true effect of the will and as to what are truly portions, my opinion is that the very nature of the provisions in the will, coupled, if necessary, with the nature of the provisions in the settlement, are sufficient in the present case to rebut the presumption that the testator did not intend to confer double portions. The considerations which I have set out in the course of this judgment are considerations which I do not think can have been brought clearly before the mind of the learned judge, because in his judgment he does not deal with those aspects of the matter.

In my opinion, the appeal succeeds, and an appropriate declaration, the actual form of which can be discussed later, should be made in that sense.

SCOTT L.J. I agree.

CLAUSON L.J. I agree. This is a very peculiar and exceptional case and depends purely upon the facts and upon the very peculiar provisions made for his family by the testator in his will and in the 1924 settlement. The decisive factor in the case seems to me to be that the settlement in 1924 appears with reasonable plainness not to be intended as an advancement of the gifts given by the will. It is merely a part of the settlement of

C. A.
1938
VAUX, *In re.*
NICHOLSON *v.* VAUX.
Clauson L.J.

his estate equally among his children and has no reference, and cannot be treated as having any implied reference, to the benefits conferred upon the settled parties by the will. The presumption of an intention to advance a child by the settlement in respect of, or on account of, the provisions made by the will, appears to me, on the facts, and in view especially of the character of the 1924 settlement, to be satisfactorily rebutted.

Appeal allowed.

Solicitors: *Patersons, Snow & Co., for Ranson & Co., Sunderland.*

P. J. B.

In re A DEBTOR.

C. A.
1939
Feb. 24, 27.

[No. 946 of 1926.]

Bankruptcy—Order of discharge subject to suspension—Order made without prejudice to order to be made under s. 51, *sub-s.* 2, *of the Bankruptcy Act,* 1914*—Order made for annual payments out of income for benefit of creditors—Subsequent decision that order came to end on date of discharge—Application to have application for discharge reheard and the order of discharge reviewed—Order for rehearing—Order on rehearing making it condition of discharge that bankrupt should make payment out of income till* 10*s. in £ paid—Jurisdiction to make these two orders—Bankruptcy Act,* 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 26, *sub-ss.* 1, 2; *s.* 51, *sub-s.* 2; *s.* 108, *sub-s.* 1.

On December 15, 1926, an order was made for the discharge of a bankrupt subject to a period of suspension and without prejudice to an order to be made under s. 51, sub-s. 2, of the Bankruptcy Act, 1914. That order was made two days later and provided for the payment by the bankrupt out of his income to the Official Receiver as trustee of an annual sum for the benefit of the creditors in the bankruptcy. It was afterwards held that this order for payment had terminated on the discharge becoming effective. On an application by the Official Receiver for a rehearing of the application for a discharge and the variation of the order of discharge, the Registrar directed a rehearing and at the rehearing varied the order of discharge by making it subject to a condition for payment of an annual sum (later to be increased) to the Official Receiver for distribution among "the creditors "in the bankruptcy" until they had received 10*s*. in the £:—

Held (affirming the two orders of the Registrar), (1.) that there was jurisdiction under s. 108, sub-s. 1, of the Act to rehear the application for a discharge and vary the order of discharge in the manner stated, although the discharge had previously become effective and the original condition ceased to operate;

(2.) that the expression "the creditors in the bankruptcy" had a clear meaning although the debtor was by his discharge released from his antecedent liability to pay them;

(3.) that on the merits the variation of the original order of discharge was properly made.

Appeal from Mr. Registrar Parton.

On August 26, 1926, a receiving order was made against the debtor on a creditor's petition, and on September 23, 1926, he was adjudicated a bankrupt. The Official Receiver was the trustee of the bankrupt's estate, and the bankrupt's debts were over 4000*l.* and his total assets only 125*l.* 16*s.* 8*d.* His bankruptcy was due to his extravagance in living. In June, 1936, the bankrupt applied for his discharge under s. 26 of the Bankruptcy Act, 1914 (1), and on December 15, 1936, the Registrar made an order of discharge from June 15, 1937, "without prejudice to any application or order made or to "be made under s. 51, sub-s. 2, of the Bankruptcy Act, "1914." (1) The Official Receiver had made an application under that sub-section on October 7, 1936, and on December 17, 1936, the Registrar made an order by which it was recited that "the bankrupt is in receipt of net earnings and salary "amounting at least to 2500*l.* per annum from his employment "as a musician" and that it appeared just and reasonable to the Court that the annual sum of 312*l.* part of the bankrupt's salary should be paid to the Official Receiver as trustee by monthly payments "during the bankruptcy in order that "the sum may be applied in payment of the debts of the "bankrupt and that the first of such payments ought to be "made on the 26th day of December, 1936, and be continued "monthly until the Court shall make order to the contrary"; and an order was made accordingly.

The bankrupt made the monthly payment notwithstanding his discharge up to April, 1938, but on May 19, 1938, the bankrupt's solicitors wrote to the Official Receiver pointing out that the monthly payments were only directed during the bankruptcy, intimating that no future payments would be made, and claiming repayment of the monthly sums paid since the discharge of the bankrupt on June 15, 1937. On May 30, 1938, the Official Receiver applied to the Court for an order striking out the words " during the bankruptcy " from the order of December 17, 1936. This application was amended by order of the Registrar so as to raise the following questions (inter alia) :—

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(1) Bankruptcy Act, 1914, s. 26: "(1.) A bankrupt may, at any "time after being adjudged bankrupt, apply to the court for an "order of discharge. . . . .

"(2.) On the hearing of the "application the court shall take "into consideration a report of the "official receiver as to the bankrupt's conduct and affairs . . . . "and may either grant or refuse "an absolute order of discharge, "or suspend the operation of the "order for a specified time, or "grant an order of discharge "subject to any conditions with "respect to any earnings or income "which may afterwards become "due to the bankrupt, or with "respect to his after-acquired "property: . . . ."

Sect. 51, sub-s. 2: "Where a "bankrupt is in receipt of a "salary or income . . . . the "court, on the application of the "trustee, shall from time to time "make such order as it thinks "just for the payment of the "salary, income . . . . or compensation, or of any part thereof, "to the trustee, to be applied by "him in such manner as the court "may direct."

"(1.) Whether the Court has jurisdiction to make it a "condition in granting a bankrupt his discharge subject to "a suspension that the same may be without prejudice to "an order to be made under s. 51, sub-s. 2, of the Act.

"(2.) If so, whether the order so to be made must be "limited in its operation to the period of suspension or can "continue beyond that period."

The amended application was heard by the Registrar on July 6, 1938, and an order made declaring that the Court had no jurisdiction to make it a condition in granting a bankrupt his discharge subject to a suspension that the same be " without prejudice to an order to be made under s. 51, "sub-s. 2, of the Act " in so far as these words were intended to operate after the period of suspension ran out, and that the order of December 17, 1936, came to an end on the discharge becoming effective.

There was no appeal from this order, but on July 25, 1938, the Official Receiver applied under s. 108 of the Act (1) for an order directing that the debtor's application for discharge might be reheard and that the order made on his application for a discharge on December 15, 1936, might be reviewed or varied. As a result of this application an order was made dated October 20, 1938, that the bankrupt's application for a discharge should be reheard.

The application was accordingly reheard on November 25, 1938. The Registrar in giving judgment said that in *In re Tobias & Co.* (2) Cave J. said with reference to s. 104, sub-s. 1, of the Bankruptcy Act, 1883 (which was identical with s. 108, sub-s. 1, of the Bankruptcy Act, 1914), that the sub-section gave the Court a discretion of the widest and most far-reaching character. He (the Registrar) was of opinion that he had power under s. 108, sub-s. 1, of the Act to review or vary the order of December 15, 1936. It was relevant, in view of the contention of Mr. Slade, who appeared for the respondents, that he could only accede to the Official Receiver's application by relegating the respondent to bankruptcy, that the words of s. 108, sub-s. 1, were " review, rescind or vary ", and that here only a review or variation was being asked for.

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(1) Bankruptcy Act, 1914, s. 108 : " (1.) Every court having "jurisdiction in bankruptcy under "this Act may review, rescind or "vary any order made by it under "its bankruptcy jurisdiction."

(2) (1891) 8 Morr. 30.

Mr. Slade also contended that on the merits the order ought not to be varied merely because there had been a misapprehension as to the power to make the order and it had proved less onerous than was intended. There was, however, another aspect of the case in which merits played an important part. The respondent was adjudged a bankrupt in 1926 with liabilities amounting to 4280*l.* and assets estimated at 125*l.* 16*s.* 8*d.* Nearly ten years later he applied for his discharge, and he was then requested by the Official Receiver, and promised, to furnish accounts as to his earnings. This promise he failed to keep, and ultimately there had to be a private examination at which it transpired that the respondent had been earning on the average 2000*l.* a year for the five years ending in March, 1935, and about 2500*l.* a year since then, that he had never made any of these earnings available for the discharge of his debts, and that after his bankruptcy he had incurred a liability to the Inland Revenue Commissioners for income tax in respect of which judgment had been recovered against him and that he was paying this off under an arrangement at the rate of 20*l.* a week. He then said that after he had paid off the Inland Revenue Commissioners he would be willing to pay 20*l.* a week to the Official Receiver towards paying his debts in full. In view of these facts, there was no substance in the contention that he (the Registrar) did not grant the respondent his discharge on the footing that he was going to make a proper contribution towards his debts under an order to be made under s. 51, sub-s. 2, and it would be lamentable if the respondent was to be permitted henceforth to enjoy his income free and unfettered from any obligation to make a contribution towards the discharge of the liabilities in his bankruptcy. He was satisfied that the case was one for an order for a moderate annual payment during the currency of the liability to the Inland Revenue Commissioners and for a larger annual payment after that liability had been discharged.

He therefore made an order which as drawn up was dated December 7, 1938, and varied the order of December 15, 1936, by striking out the words in the last paragraph of the order "without prejudice to any application or order made "or to be made under s. 51, sub-s. 2, of the Bankruptcy Act, "1914," and substituting in lieu thereof the words "subject "to the condition that the respondent do, notwithstanding the "limitation of the suspension of his discharge from bankruptcy "to the period of six months from the 15th day of December, "1936, pay to the Official Receiver as trustee, for distribution "among the creditors in the bankruptcy, out of his future "earnings after-acquired property and income, until the said "creditors shall have received 10*s.* in the £, the sum of 312*l.* "per annum by equal monthly instalments of 26*l.* each until "the termination of the existing arrangements between the "respondent and the Commissioners of Inland Revenue "whereby he is paying 20*l.* a week to the said Commissioners, "and thereafter 800*l.* per annum by equal monthly instalments "of 66*l.* 13*s.* 4*d.* each, the first of the above-mentioned instal-"ments to be paid on the second day of January, 1939."

The bankrupt appealed against the orders of October 20, 1938, and December 7, 1938. The appeal was heard on February 24 and 27, 1938.

G. O. Slade (*G. F. Kingham* with him) for the appellant. Till the Bankruptcy Act, 1890, a bankrupt's discharge could not be granted subject to a condition. That was provided for in s. 8, sub-s. 7, of the Act of 1890, the language of which is reproduced in s. 26, sub-s. 8, of the Bankruptcy Act, 1914. Sect. 26, sub-s. 8, provides: "The powers of suspending "and of attaching conditions to a bankrupt's discharge may "be exercised concurrently." Under s. 28, sub-s. 2, the order of discharge releases the bankrupt from all debts other than those specifically excepted by sub-s. 1. When once an order of discharge has taken effect, there is, it is contended, no jurisdiction to impose conditions on or review the order of discharge. The status of the former bankrupt has become that of a discharged person and it cannot be interfered with. The Court has ceased to have any jurisdiction over him. A condition must be imposed concurrently with the order suspending the order of discharge, and the powers given by s. 108 cannot be used to affect the bankrupt after his discharge unless a valid condition was previously imposed. An application which seeks to impose on the discharged bankrupt a more onerous condition than that on which he accepted his discharge is an abuse of s. 108, sub-s. 1. It is essential that the bankrupt should know the precise terms on which he is being granted his discharge. A review can only be obtained under s. 108, sub-s. 1, when the order of discharge was made subject to an existing condition. Here, owing to the construction the Registrar has put on his previous order, the foundation of the jurisdiction under s. 108 does not exist.

Further, the order of discharge freed the debtor from all debts provable in the bankruptcy, and the new order for payment by the debtor of sums to be distributed "among "the creditors in the bankruptcy" is a misuse of language, for no such creditors now exist.

Again, on the merits, this is not an order that should have been made. All the bankrupt has done is to act on legal advice that his liability to make any payment under the order made under s. 51, sub-s. 2, of the Act had ceased, and this view has been upheld. It is hard that a man who has ceased to be a bankrupt for over a year should be made bankrupt again merely because he has exercised his legal rights. [He referred to *Ex parte Brown* (1); *Ex parte May* (2); *In re Pickard* (3); and *In re Tobias & Co.* (4)] The Registrar has not exercised a judicial discretion and no terms should be imposed on the debtor.

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(1) (1874) L. R. 9 Ch. 304, 307.

(2) (1884) 12 Q. B. D. 497.

(3) [1912] 1 K. B. 397.

(4) 8 Morr. 30, 33.

Sir Terence O'Connor S.-G. and *V. R. Aronson* for the Official Receiver. There is no doubt that the order made on the review of the application for a discharge could have been made originally, and, apart from so much of the order of December 7, 1938, as provided for increased payments after the income tax arrears had been paid off, the order carried out the original intention of the Registrar. No appeal has been brought from the order limiting the effect of the order made under s. 51, sub-s. 2, and this appeal therefore proceeds on the footing that it was right and that the established practice dating back to *In re Gold* (1) was wrong. But there is no doubt that the Registrar intended payments by the bankrupt to continue after the date of discharge. It has been argued that there is no jurisdiction under s. 108, sub-s. 1, to vary an order of discharge after the period of suspension has ceased, because the bankruptcy is at an end. But the discharge does not put an end to the bankruptcy. Thus the Bankruptcy Act, 1914, s. 26, sub-s. 2, contemplates an order being made after the discharge: see also as to the effect of an order of discharge *Ex parte Waters* (2), which shows that the debtor is still subject to the bankruptcy jurisdiction. But apart from the general principles applicable, there is clear authority that the order of discharge can be reheard under s. 108 after the order of discharge has taken effect: *In re Tregaskis.* (3) Further, there is here no question of varying the status of the bankrupt. It is not as if the period of suspension was varied. The power to vary orders under the Bankruptcy Act is very wide: compare *In re A Debtor* (No. 1088 of 1923) (4) and *In re Harman.* (5)

[They also referred to *Winsford Urban District Council* v. *Cheshire Lines Committee.* (6)]

G. F. Kingham replied.

SIR WILFRID GREENE M.R. On August 26, 1926, a

(1) (1891) 8 Morr. 45.
(2) (1874) L. R. 18 Eq. 701.
(3) (1889) 6 Morr. 309, 312.
(4) [1924] B. & C. R. 1.
(5) [1934] A. C. 245.
(6) (1931) 21 Rail. & Can. C. 10.

receiving order was made against the appellant, and on September 23, 1926, he was adjudicated bankrupt. On June 30, 1936, he applied for his discharge. I am not sure whether it was on the same date, but anyhow at or about the same time the Official Receiver made an application under s. 51, sub-s. 2, of the Bankruptcy Act, 1914, which empowers the Court to make orders as to payments of salary or part of salary to the trustee in bankruptcy for application in such manner as the Court may direct. The bankrupt was in receipt of a substantial salary, and that was the reason why that application was made. Those two applications were disposed of by Mr. Registrar Parton in two orders. The first order was dated December 15, 1936, and it was made on the debtor's application for his discharge. The order stated that proof had been made of the facts: (1.) that the assets were insufficient to pay 10*s.* in the pound, and (2.) that the bankrupt had brought on his bankruptcy by unjustifiable extravagance in living. Those are matters which, under s. 26 of the Bankruptcy Act, have to be dealt with. The order suspended the bankrupt's discharge for six months, discharged him as from the expiration of the six months (that is, as from June 15, 1937), and then it contained these words: "without prejudice to any application or order made or to "be made under s. 51, sub-s. 2, of the Bankruptcy Act, 1914." Those words were inserted because, as the learned Registrar knew and everybody knew, the Official Receiver's application under s. 51, sub-s. 2, was about to be dealt with. It was in fact dealt with two days later by an order of December 17, 1936. That order recited that the bankrupt was in receipt of net earnings and salary amounting to at least 2500*l.* a year; it recited that it appeared just and reasonable to the Court "that the annual sum of 312*l.*, a portion of the said "salary of the bankrupt, ought to be paid to the Official "Receiver as trustee, by monthly payments of 26*l.* during "the bankruptcy in order that the same may be applied in "payment of the debts of the bankrupt, and that the first "of such payments ought to be made on the 26th day of "December, 1936, and be continued monthly until this Court "shall make order to the contrary." Then the order provided that "the said sum shall be paid by the said bankrupt in "manner aforesaid out of the bankrupt's said salary"; and liberty to either party to apply was reserved.

At the date when those two orders were made it was the intention of the learned Registrar, which was perfectly well understood by the parties, that the order with regard to the payment of 312*l.* a year was an order that should continue to operate even after the six months' period of suspension had elapsed, and further, under the references in the order of December 17, 1936, and the liberty to apply, it was, to the knowledge of everybody, in contemplation that at a later stage some application would fall to be made, and, in particular, an application by the Official Receiver in the light of the following circumstances: At that date, that is to say in December, 1936, the bankrupt, under an arrangement with the Inland Revenue authorities, was making payments of 20*l.* a week in respect of an undischarged income tax liability, and as soon as that arrangement had been worked off and those payments came to an end it was contemplated that an additional sum would be ordered to be paid out of his salary to the Official Receiver—that is to say, a sum in addition to the 312*l.* a year already ordered. The date for discharge duly came and, after the discharge, for a substantial period of, I think, a year or thereabouts, the bankrupt continued to make the monthly payments directed by the order of December 17. His solicitors then took the point that under the order the obligation to make payments came to an end when the discharge date arrived, and they claimed that the bankrupt was thereupon free from his obligation under the order. They further claimed repayment of the sums which had been paid in respect of the period subsequent to the discharge.

The result of that was an application to Mr. Registrar Parton which, in its final form, raised questions as to the effect of the orders of December 15 and 17 and the jurisdiction to make them. Mr. Registrar Parton, on July 6, 1938, made an order to the following effect. He first of all declared that the Court had no jurisdiction to make it a condition in granting the bankrupt his discharge, subject to a suspension, that the same be without prejudice to an order to be made under s. 51, sub-s. 2, of the Act, so far as the words " without prejudice to any order to be made under "s. 51, sub-s. 2," are intended to operate after the period of suspension runs out. That means, I understand, this: that it would not be permissible, in an order directing discharge after a period of suspension, to reserve to the Court power to make an order under s. 51, sub-s. 2, after the date when the suspension ran out. Secondly, he declared " that "the order of the 17th December, 1936, was not made under "or by virtue of the words ' without prejudice,' " etc., " in "the order of discharge of the 15th December, 1936, but "under the power conferred by s. 51, sub-s. 2, which can be "exercised by the Court at any time up to the discharge of "a bankrupt taking effect, and that such an order comes to "an end on the discharge becoming effective " ; and, thirdly, "that the words ' during the bankruptcy ' in the order of "the 17th December, 1936, refer to the period during which "the respondent remained undischarged."

No appeal was brought from that order, and on this appeal as between the parties it must be taken that that order is a binding order. The effect of it, of course, was that the order for payment of the monthly sums came to an end when the discharge took place, that is to say on June 15, 1937. Now it appears that the form of order which was adopted by Mr. Registrar Parton in his order of December 17, 1936, is a form which has been in use for a great many years. It appears to have been generally understood, and certainly Mr. Registrar Parton, as he himself tells us in his judgment, always understood, that the effect of that order was to make payments of this character continue to be exigible after the suspension had come to an end. That was the intention of the learned Registrar, and it was what was in contemplation of both parties, as I have already said. The learned Registrar when he delivered judgment on those questions indicated at the end of his judgment that the case was one where the

Court, if it had jurisdiction, might review its previous order and make an order of the kind which it had intended to make originally; and, acting on the suggestion so made, the Official Receiver made an application for a review under s. 108, sub-s. 1, of the Bankruptcy Act, 1914. That application was dealt with by Mr. Registrar Parton in two stages. He first of all dealt with the question whether or not in the circumstances of the case he had jurisdiction under s. 108, sub-s. 1, to reopen the matter, and on the second occasion he dealt with the matter on the merits. Pursuant to an application to this Court, an arrangement was made by which both those matters could conveniently come before this Court together, and they now so come. The orders against which the appellant appeals are two. One of those orders is dated October 20, 1938. That was an order under which Mr. Registrar Parton, having decided that there was jurisdiction, made the consequential order for the hearing of the respondent's application for discharge on December 15, 1936, to be reheard for the purpose of enabling the Court to determine whether, and in what manner, the order made on such application on December 15, 1936, should be reviewed or varied. The other order is dated December 7, 1938, and it is to this effect. [His Lordship stated the effect of the order substantially as set out in the statement of facts, and continued :] Then the Official Receiver was given leave to apply as to the larger payment on evidence of the termination of the arrangement with the Inland Revenue authorities or that the respondent was unduly delaying the completion of that arrangement.

From those two orders the debtor appeals, and he raises a number of points. The point which logically comes first is as to the jurisdiction of the Court to review the order of December 15, 1936. It was said in the first place on behalf of the appellant that the jurisdiction under s. 108, sub-s. 1, does not continue after the discharge has taken effect. It was suggested at one period in the argument that in the present case to assert that that jurisdiction continued would in effect be to enable the Court in some way to alter the status of the bankrupt by putting him back into bankruptcy.

I may say at once with regard to that argument that, whether or not the Court, in a proper case, has that power to alter the status of the bankrupt under the section, in the present case nothing of the sort has been done. The bankrupt was discharged: his discharge is effective, and he remains discharged. He is no longer an undischarged bankrupt, and there is nothing in this order which puts him back into that condition. The order is entirely without prejudice to the discharge, and merely does what could admittedly, by a proper form of words, have been provided in the original order for discharge. It continues the personal order against the bankrupt in such a way that it operates after his discharge and imposes upon him liability in respect of after-acquired property which would not vest in his trustee in bankruptcy. Therefore, in my opinion, the suggestion that this in some way interferes with the status of the bankrupt is entirely unjustified.

Now the main argument on this head, namely, that the jurisdiction of the Court under that section ceases when the bankrupt is discharged, is put in this way. It is admitted that in the order of discharge, whether it does or whether it does not contain a suspension clause, it is competent to the Court to insert a condition such as that with which we are now dealing, which will continue to operate after the discharge has become effective. That is conceded. It is also conceded that, in a case where that has been done, the Court, under s. 108, retains its jurisdiction to vary any such condition, even though the discharge has become effective. For instance, supposing a bankrupt's discharge was suspended for one year and the order imposed a condition upon him that for three years he should out of his salary or some other source make certain payments, there would be a case where the order for payment would continue for two years after the discharge. It is not suggested that in the second year or in the third year the Court would not have jurisdiction to vary that condition, and it is obviously for the benefit of bankrupts in general that the Court should have such a power. It could vary such a condition by reducing the amount if it became impossible or if it became a hardship on the bankrupt to pay it: similarly, if it can do that, it must have the power to raise the amount if, owing to a change in the bankrupt's circumstances, it is right and proper that he should make a larger payment. Therefore it is conceded that the jurisdiction under s. 108, sub-s. 1, is not terminated by the mere discharge in bankruptcy. But it is said that as a condition of its continuance there must be in existence at the time when the jurisdiction is invoked some subsisting, continuing and operating order. In the case that I have put there would be in the second year and the third year an order still in operation: the bankrupt would, so to speak, still be on the string, although he had obtained his discharge, because the Court of Bankruptcy had kept its hand upon him. In the present case it is said that, having regard to the construction which the learned Registrar has put upon his own order and his declaration as to its effect, the string was cut as soon as the period of suspension came to an end, and there was no foundation upon which the Court's jurisdiction under s. 108, sub-s. 1, could be based. I am quite unable to find from the language of the section any ground whatsoever for drawing a distinction of that kind. The language of the section is perfectly general—"every Court having jurisdiction "in bankruptcy under this Act." The Court had jurisdiction in bankruptcy under the Act; the order of discharge did not take away the jurisdiction of the Court in Bankruptcy, because admittedly the discharge of the bankrupt does not put an end to the bankruptcy regarded as a series of judicial and administrative acts and rights and powers. It is true that the discharge of the bankrupt has the effect which the statute states, but that does not mean that as from the date of discharge there is no Court having jurisdiction in bankruptcy within the true meaning of s. 108, sub-s. 1. That would be a perfectly hopeless construction. The Court, therefore, fulfils the definition laid down: its power is to review, rescind, or vary any order made by it under its bankruptcy jurisdiction. The order which Mr. Registrar Parton has reviewed was made by him under his bankruptcy jurisdiction, and accordingly the language of the section, if properly

C. A.
1939
A DEBTOR, *In re.*
Sir Wilfrid Greene M.R.

construed according to its ordinary meaning, is amply sufficient to cover this case; and I can find no justification for writing into that clear language some qualification which would exclude its application in such a case as the present. Therefore I come to the conclusion, and quite clearly come to the conclusion, that Mr. Registrar Parton had jurisdiction under the section.

Here another point was taken to which I must refer, and it was this: It was said that the result is absurd, and for this reason, that the order of discharge discharged the debtor, according to the language of s. 28, from all debts provable in the bankruptcy, with certain exceptions. It is said that the order must be bad or that it is meaningless in that it directs that the payments to be made under it are to be applied in distribution among the creditors in the bankruptcy. It is said that there are no creditors in the bankruptcy of this debtor because he has been discharged, and the effect of that is to discharge him from all his debts. That I can deal with in a sentence or two. The phrase " the creditors in the "bankruptcy" in the order has a perfectly clear meaning. It means those persons who were creditors in the bankruptcy; and the fact that the debtor is by the order of discharge released from his antecedent liability to pay those debts does not make those persons any the less " creditors in the "bankruptcy." It is perfectly clear what persons are meant by that order, and I can find no such objection to the order as is suggested by Mr. Slade.

The next point that was taken was this: It was said that the power of attaching conditions to a bankrupt's discharge in a case where the discharge was suspended must be exercised concurrently with the power of suspension. For that, reliance was placed upon sub-s. 8 of s. 26 of the Bankruptcy Act, 1914, which must be read in conjunction with sub-s. 2 of that section, which empowers the Court to grant or refuse discharge, to suspend its operation, or to grant a discharge subject to conditions. It is said that, where there is an order for suspension, the only power to impose conditions is a power to do so concurrently; that in the present case the power to order suspension was exercised by the order of December 15, 1936, while the imposition of conditions took place under the order of December 7, 1938; and that this was not a concurrent exercise of the two powers. There again, in my opinion, there is no substance in that argument at all. It seems to me that if you read those provisions of s. 26 together with s. 108, sub-s. 1, as you are bound to do, it is impossible to say that an imposition of a condition under the power in sub-s. 1 of s. 108 is not a concurrent exercise within the meaning of s. 26, sub-s. 8. One test of that can be obtained by reference to a point to which I have referred earlier in this judgment. Take a case where a bankrupt has obtained his discharge subject to suspension for one year, with the condition that he shall, during three years from the order, make certain payments. It is not disputed, as I have already said, that after the expiration of the first year the Court can alter those conditions, can cut them down, can add to them. That would not be a concurrent exercise of the power of imposing conditions in the narrow sense in which Mr. Slade would have us construe those words; but even he was constrained to admit that in such a case the Court would have jurisdiction by a subsequent order after the discharge had become effective to impose a new condition by calling for a further or a different class of payment. If that is a concurrent exercise, the present is a concurrent exercise. All I need say is that all these provisions must be read together and must be made to work together, and once that is appreciated the point really raises no difficulty at all.

Finally, an argument was put before us based on the merits of the case. I do not wish to say anything about the details of this case more than this, that the case is one in which, as it seems to me, on the merits the rigour of the bankruptcy law under the present powers of the Court could, and should, properly be applied to this debtor. I can see no ground whatsoever for criticizing the fairness or propriety of the order which the learned Registrar has made. If that order had been made in the first instance, as indeed it was considered that it had been made, no complaint could possibly have been made. It is said, and it is said truly, that the jurisdiction under s. 108, sub-s. 1, to rehear is one that must be exercised with great caution. That does not mean that the very beneficent and useful powers which the section confers, both from the point of view of debtors and from the point of view of creditors, ought not to be exercised in a proper case. There is always a danger when one is told (and quite rightly told) that some particular power of the Court must be exercised with great caution. The Court may be led to think that " Safety First " is the best motto in such matters, but the power is there and is intended to be exercised, and in a proper case ought to be exercised. In the present case not only do I think that the power, in the circumstances of the particular case, ought to have been exercised, but I think it has been exercised in a perfectly proper and just manner.

In the result, therefore, the appeal fails on all points and must be dismissed with costs.

MacKinnon L.J. I agree, and I do not think I can usefully add anything.

Clauson L.J. I agree. I should only wish just to add this caution. There was no appeal from the judgment of Mr. Registrar Parton which was delivered on July 6, 1938, and this case, of course, has been argued, and has had to be argued, in this Court on the footing that that decision was correct. It is not for us to express, as there is no appeal, any view about it, but I think it is only right, as an assistance to those who have to administer the Act, to point out that any Court which has to consider a similar problem in the light of Mr. Registrar Parton's judgment of July 6, 1938, will not be able to consider the problem without having regard to the reasons for the present judgment which have been expressed by the Master of the Rolls.

Appeals dismissed.

Solicitors : *Amery-Parkes & Co. ; Solicitor, Board of Trade.*

H. C. G.

In re LONDON GENERAL INSURANCE COMPANY, LIMITED.

BENNETT J.

1938

July 29.

[No. 00248 of 1935.]

Company—Insurance company carrying on various classes of business—Compulsory liquidation—Assets how distributable—Assurance Companies Act, 1909 (9 *Edw.* 7, *c.* 49), *ss.* 2, 3, 4, 5.

At the date on which an order was made for the compulsory winding up of an insurance company, the company was transacting life assurance business, bond investment and endowment certificate business, motor insurance business, fire insurance business, and general accident insurance business :—

Held, that, having regard to the provisions of ss. 2, 3, 4 and 5 of the Assurance Companies Act, 1909, all the creditors of the company, in respect of whatever their claims might be, ranked pari passu against all the assets, except in so far as the receipts of either the life assurance fund or the bond investment fund could be traced into any particular asset.

SUMMONS.

On May 7, 1935, an order was made for the compulsory winding up of London General Insurance Co., Ld. At that date the company was transacting life assurance business, bond investment and endowment certificate business, motor insurance business, fire insurance business, and general accident insurance business.

A summons was taken out by the liquidator for the purpose of obtaining directions as to the manner in which the assets of the company were to be distributed among the various classes of the company's creditors.

The questions raised were as follows :—

(I.) Whether the creditors of the company whose claims have arisen in respect of its ordinary life business are entitled to be paid to any and what extent and out of any and what assets of the company in priority to the other creditors of the company or any and which class or classes of such other creditors.

[The second and third questions were to the same effect as question (I.) with regard to creditors in respect of the bond investment and fire insurance businesses of the company respectively.]

BENNETT
J.
1938
London
General
Assurance
Co.,
In re.

(4.) Whether or to what extent the creditors of the company whose claims have arisen in connection with the ordinary life business, the bond investment business, and the fire insurance business of the company or any and which of such businesses rank pari passu inter se against the assets of the company and whether pari passu with or in priority to the creditors whose claims have arisen in connection with the motor insurance business of the company and/or the general creditors of the company.

(5.) Whether the assets available for distribution among the policy holders and creditors of the company should be appropriated to any and what extent and in any and what proportions to any and which of the different funds of the company ascertained as at the date of the commencement of the liquidation of the company and how any amounts so appropriated should be distributed.

Cecil Turner for the liquidator.

Hon. Denys Buckley for creditors in connection with the ordinary life assurance business of the company. The section of the Assurance Companies Act, 1899, which mainly affects the question is s. 3. (1) Other material sections are ss. 2 and 4.

The only classes of business which were being carried on by this company at the time when the winding-up order was made, in respect of which there were separate funds to which s. 3, sub-s. 2, could apply, were the life assurance business and the bond investment and endowment business.

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(1) Sect. 3 of the Assurance Companies Act, 1909: "(1.) In "the case of an assurance company "transacting other business besides that of assurance or transacting more than one class of "assurance business, a separate "account shall be kept of all "receipts in respect of the assurance business or of each class of "assurance business, and the "receipts in respect of the assurance business, or, in the case of "a company carrying on more "than one class of assurance "business, of each class of business, shall be carried to and form "a separate assurance fund with "an appropriate name: Provided "that nothing in this section shall "require the investments of any "such fund to be kept separate "from the investments of any "other fund.

"(2.) A fund of any particular "class shall be as absolutely the "security of the policy holders of "that class as though it belonged

The secured creditors are entitled to their securities in the first place and, after they have been disposed of, the remaining assets of the company ought to be divided between the life assurance fund creditors and the bond investment fund creditors in the proportion which those two funds bear to one another.

Sect. 3, sub-s. 2, has no application to motor insurance, fire insurance or general accident insurance, with the result that the creditors in respect of those businesses are on the same footing as any other general creditors of the company.

The point arising in this case under s. 3, sub-s. 2, has not previously arisen, but some observations as to the effect of the section are to be found in *Liquidators of Glasgow Assurance Corporation* v. *Welsh Insurance Corporation.* (1)

[He also referred to : *In re National Standard Life Assurance Corporation* (2) ; and *In re South East Lancashire Insurance Co., Ld.* (3) ; *In re Hearts of Oak Assurance Co., Ld.* (4) ; and *Wesleyan and General Assurance Society* v. *Attorney-General* (5).]

The section is directed to preventing the life assurance creditors from being prejudiced by the fact that the company is carrying on another class of assurance, so as to endanger their investments in the company—investments in the sense that life assurance is a form of thrift.

After any secured creditors have been paid, the life assurance creditors and the bond investment creditors take, out of the assets which remain, everything, until they have been paid their proportion of the assets.

The creditors, whose claims have arisen in respect of the ordinary life assurance business of the Company, are entitled to be paid in priority to the bond investment creditors, subject to the point that, if there should be insufficient cash to provide

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"to a company carrying on no "other business than assurance "business of that class, and shall "not be liable for any contracts "of the company for which it "would not have been liable had "the business of the company "been only that of assurance of "that class, and shall not be "applied, directly or indirectly, "for any purposes other than "those of the class of business to "which the fund is applicable."

(1) 1914 S. C. 320.

(2) [1917] 1 Ch. 193.

(3) [1935] Ch. 225.

(4) [1936] Ch. 558.

(5) [1933] Ch. 591.

a proper sum for the life fund and a proper sum for the bond investment fund, they would have to abate rateably.

Neil Lawson, for bond investment creditors, adopted the argument on behalf of the life assurance creditors, so far as that argument related to the bond investment creditors and their fund.

As soon as the company has gone into liquidation, the fund becomes a specific proportion of the realized assets, with an actual separate existence, to which the creditors entitled to look to that fund are entitled to resort in priority to other creditors of the company.

They are entitled to resort to that proportion of the company's assets which represent their fund and, if that proportion is insufficient to meet their claims, they are then entitled to prove as general creditors as against the remaining assets, if any, of the company, and to prove pari passu with the fire insurance, general insurance, and motor insurance creditors.

[He referred to *In re South East Lancashire Insurance Co., Ld.* (1)]

J. G. Strangman for fire insurance policy holders.

The fire insurance business was always profitable and its fund was always in credit. It would not, therefore, be right that the creditors of the company in this class of business should, according to the arguments put forward on behalf of the life assurance creditors and the bond investment creditors, be reduced to a dividend of something just under or just over a penny in the pound.

The assets of this company have been so mixed up that it is impossible to allocate any particular asset, or any part of any particular asset, to any particular fund. Sect. 3 of the Act of 1909 contemplates and provides for the establishment of a trust fund in regard to each class of business which is not excepted from the provisions of this section by the later sections of the Act.

The life fund is a trust fund constituted by the balance of the receipts of the company in respect of the life assurance business over its outgoings in respect of the same business and in so far as the moneys or assets of the company could be traced to this fund, the life assurance creditors would be entitled to them—otherwise they have no preference over the general creditors and creditors of the other branches of business. It is plain, on the evidence, that nothing can in this case be traced as belonging to any particular assurance fund.

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(1) [1935] Ch. 225.

If an insurance company, carrying on life and other classes of insurance business, was entitled, under the proviso at the end of the first sub-section of s. 3, so to muddle its investments that it could not tell which or what part of which investment in fact belonged to a particular fund, it would be impossible for the auditor of the company to give the certificate required under note 4 to the Third Schedule.

It is, therefore, submitted that all the creditors of the company in respect of whatsoever claims—other, of course, than secured creditors—rank pari passu against the assets of the company, except in so far as any particular assets can be traced to either the life assurance fund or the bond investment fund.

B. M. Cloutman for motor insurance policy holders. It is clear that the scheme of the Act is to provide for definite funds. When the enacting part of s. 3 is looked at, it is clear that the receipts of each class of business shall be carried to and form a separate assurance fund with an appropriate name. The assets ought to be applied pari passu among the creditors. That is the policy of the Companies Act—a policy which should be followed, unless it is clearly displaced. In answering questions 1 to 5, therefore, the provisions of s. 247 of the Companies Act, 1929, should be followed, save in so far as assets can be specifically referred to the bond investment fund and the life fund.

C. A. Settle for the general creditors.

Hon. Denys Buckley in reply.

BENNETT J. This is a summons issued in the winding up of the London General Insurance Co., Ld., a company which is in course of being wound up by the Court under a winding-up order made on May 7, 1935.

BENNETT J.

1938

London General Assurance Co., *In re.*

The summons has been issued by the Liquidator for the purpose of obtaining directions as to how the assets are to be distributed amongst the various classes of the company's creditors. These have been classified because the company carried on different kinds of assurance businesses, and it has been suggested that, having regard to the provisions of the Assurance Companies Act, 1909, some of the assets of the company may be the security for the claims of some of the creditors. At the date of the winding up the company was carrying on life assurance business, bond investment business, motor insurance business, fire insurance business, and general accident insurance business. It has creditors whose claims arise exclusively out of transactions in connection with one or other of such businesses. It also has creditors whose claims arise out of transactions which are not exclusively related to any of such businesses. Such creditors are called general creditors.

The question to be determined on the summons is whether any and which of such creditors have a security upon any and which of the company's assets. The question mainly turns upon the meaning and effect of s. 3 of the Assurance Companies Act of 1909, a section which has always been a puzzle.

There are five questions asked by the summons. [His Lordship read the questions and continued :]

The main contest has been between the creditors whose claims arise out of the life assurance business and the bond investment business on the one side and all other classes of creditors on the other side.

For the first side the arguments were to the effect that under the provisions of s. 3 of the Act a company subject to the provisions of the section was bound to create a separate assurance fund or separate assurance funds, and that this fund or these funds were by virtue of sub-s. 2 of the same section to be a security for the policy holders. That whilst the company was a going concern these funds were undivided shares of the company's assets. That the shares were such proportions of the company's assets as the values of the respective funds in the balance sheets of the company bore to the book value of the company's assets in the same balance sheets: that, when liquidation occurred, the rights crystallized, and that a fraction of the net proceeds of realization of the company's assets was attributable to each separate assurance fund: that the fraction was represented by the book value of the respective funds over the book value of the assets of the company at the date of liquidation; and that these shares of the net proceeds of realisation were the funds which under sub-s. 2 of s. 3 of the Act were to be the absolute security of the life assurance policy holders and bond investment policy holders respectively. It was said that against these funds creditors in respect of life assurance business and creditors in respect of bond investment business had a right of proof to the exclusion of all other creditors. If these funds were not sufficient to pay their claims in full, then, that such creditors could prove for any deficiency against any other assets of the company pari passu with all other creditors.

For the other side the argument was that all the creditors ranked pari passu against all the assets of the company with this limitation; if there were any asset into which there could be traced receipts from a class of business for which under the Act a separate assurance fund had to be kept, then, upon such an asset the creditors in respect of that class of business had a preferential claim. The arguments turned upon the meaning and effect of s. 3 of the Act. Sects. 2, 4 and 5 were relied upon as throwing light upon the meaning and effect of s. 3.

Sect. 3 reads as follows [His Lordship read the section and continued:] The first sub-section imposes two distinct obligations upon a company carrying on assurance business and some other business or upon a company carrying on different classes of assurance business.

The first obligation is to keep separate accounts of the receipts in respect of the assurance business or of each class of assurance business. This obligation seems to be merely an obligation as to the method of keeping accounts.

The second obligation is with respect to the receipts themselves. These are to be carried to and are to form a separate assurance fund with an appropriate name. This obligation is followed by the proviso that nothing in the section is to require the investments of any such fund to be kept separate from the investments of any other fund. It is the proviso which to my mind creates the difficulty and makes it impossible, I think, to be clear what is the effect of sub-s. 2 and clear as to what property was to be the security of the policy holders referred to in the sub-section. Sects. 2, 4 and 5 of the Act do not really throw any light upon the meaning of s. 3. All I am prepared to hold is that the language of the section has not the meaning or effect which it was said to have by those who presented the arguments on behalf of the life assurance creditors and bond investment creditors.

On the other hand one ought to endeavour to put some meaning on s. 3.

It is possible I suppose to use a system of book-keeping which will preserve a record of how the receipts from a particular class of business are dealt with and show how such receipts have been invested. And if it be possible in the books of this company to trace receipts from a class of business for which a separate assurance fund has to be kept into a particular asset, any such asset would in my judgment be a security for the debts of creditors arising exclusively out of that class of business.

I will give one answer to all five questions asked by the summons. The answer will be to the effect that all creditors of the company rank pari passu against all the assets of the company except in so far as the receipts of either the life assurance fund or the bond investment fund can be traced into any particular asset.

Solicitors: *Richard Rowlands & Co.; William Hurd & Son; Bennett & Bennett; E. B. V. Christian & Co.; Rule & Cooke; T. & N. Blanco White.*

J. L. D.

[MANCHESTER DISTRICT REGISTRY.]

In re JOHN THOMAS (DECEASED).

[1938. T. 5173.]

BENNETT J.

1939

Feb. 2.

Settlement—Tenant for life—Land devised to tenant for life and, after death of tenant for life, in trust for persons in undivided shares—Right of personal representative of testator to have the land vested in him—Settlement deemed to be notionally subsisting after death of tenant for life—Settled Land Act, 1925 (15 *Geo.* 5, *c.* 18), *s.* 30, *sub-s.* 3 ; *s.* 36, *sub-s.* 1.

J. T. made his will on August 25, 1913. He appointed his wife, A. T., his executrix, and gave and bequeathed to her his real and personal estate for her sole use and benefit during her life, and after her death to be equally divided between his surviving children. J. T. died on December 3, 1915, and on March 9, 1916, probate was granted to his widow, A. T. His residuary estate included two dwelling-houses in Anglesey.

J. T. left five children surviving him, and one of them died on August 20, 1918, intestate and a bachelor.

A. T. died intestate on November 21, 1931, and on April 18, 1932, letters of administration to her estate were granted to E. R.

On October 14, 1938, letters of administration with the will annexed were granted in respect of the estate of J. T. to J. L. A.

J. L. A. claimed that by virtue of s. 30, sub-s. 3, and s. 36, sub-s. 1, of the Settled Land Act, 1925, he was the trustee of the settlement created by the testator's will and was entitled to call upon E. R. to assent to the two dwelling-houses vesting in him. E. R. refused, contending that, having regard to the limitations of the will and the events which had happened, J. L. A. was not entitled to have the property vested in him:—

Held, that, although the land was held in trust for persons entitled in possession in undivided shares, it must still be regarded notionally as settled land. J. L. A., as personal representative of J. T., had the right to call upon E. R. to assent to the land vesting in him.

In re Cugny's Will Trusts [1931] 1 Ch. 305 followed.

ADJOURNED SUMMONS.

By his last will dated August 25, 1913, John Thomas appointed his wife, Ann Thomas, to be his executrix, and, after directing payment of all his debts and funeral expenses, he gave and bequeathed unto his said wife all his real and personal estate for her sole use and benefit during her life and after her

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Reported by F. R. R. Burford, Barrister-at-Law.

death to be equally divided between his surviving children so long as they did right by their mother, excepting the household furniture and effects, which he left after his wife's death to his daughter Mary Emma if still unmarried.

John Thomas died on December 3, 1915, and on March 9, 1916, probate of his will was granted to his widow, Ann Thomas. His residuary estate included two dwelling-houses in Anglesey.

John Thomas left five children surviving him—namely, Anna Thomas Caldwell, Mary Emma Marshall, Joseph Henry Thomas, Eleanor Roberts, and John Owen Thomas. John Owen Thomas died on August 20, 1918, intestate and a bachelor.

Ann Thomas, the widow of John Thomas, died on November 21, 1931, intestate, and on April 18, 1932, letters of administration in respect of her estate were taken out by her daughter, Eleanor Roberts.

On October 14, 1938, letters of administration with the will annexed of all the unadministered estate of John Thomas were granted to Joseph Lea Axon, as the attorney of Anna Thomas Caldwell, one of the children of John Thomas. The said Joseph Lea Axon claimed to be trustee of the settlement created by the will of John Thomas under s. 30, sub-s. 3, of the Settled Land Act, 1925 (1), and he contended that under s. 36, sub-s. 1 (2), of that Act he was entitled to call upon

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(1) Settled Land Act, 1925, s. 30, sub-s. 3: "Where a settlement is "created by will, or a settlement "has arisen by the effect of an "intestacy, and apart from this "subsection there would be no "trustees for the purposes of this "Act of such settlement, then the "personal representatives of the "deceased shall, until other trus-"tees are appointed, be by virtue "of this Act the trustees of the "settlement, but where there is "a sole personal representative, "not being a trust corporation, it "shall be obligatory on him to "appoint an additional trustee to "act with him for the purposes of "this Act, and the provisions of "the Trustee Act, 1925, relating "to the appointment of new "trustees and the vesting of trust "property shall apply accord-"ingly."

(2) Settled Land Act, 1925, s. 36, sub-s. 1: "If and when, after the "commencement of this Act, set-"tled land is held in trust for "persons entitled in possession "under a trust instrument in "undivided shares, the trustees of "the settlement (if the settled "land is not already vested in "them) may require the estate "owner in whom the settled land "is vested (but in the case of a "personal representative subject "to his rights and powers for "purposes of administration), at "the cost of the trust estate, to

BENNETT
J.
1939
JOHN
THOMAS,
In re.

Eleanor Roberts, as administratrix of Ann Thomas, to transfer the two dwelling-houses to him. Eleanor Roberts declined to do so, and a summons was taken out on the application of Joseph Lea Axon, and served upon Eleanor Roberts. The summons asked " For an order that the property described "in the schedule hereto " [the two dwelling-houses in question] " being property formerly subject to the settle-"ment created by the above-mentioned will " [being the will of John Thomas] " but now held in trust for the children "of the said John Thomas deceased who are entitled in "possession in undivided shares may vest in the applicant "Joseph Lea Axon the trustee of the said settlement for the "purposes of the above-mentioned Act in its entirety for the "estate therein now vested in the said Eleanor Roberts to be "held by the said Joseph Lea Axon upon the statutory trusts "upon which the same ought to be held pursuant to the said "Act."

Allan Walmsley for the applicant, J. L. Axon. The applicant is entitled to the order for which he asks. As personal representative of the testator, John Thomas, he is a trustee of the settlement, until other trustees are appointed: Settled Land Act, 1925, s. 30, sub-s. 3. As such, he is entitled to call upon the administratrix of the tenant for life to assent to the land vesting in him, to be held upon the statutory trusts: Settled Land Act, 1925, s. 36, sub-s. 1.

The land is held in trust for persons entitled in possession in undivided shares, and so it is subject to a trust for sale. But for the purposes of creating the suitable machinery, it is deemed notionally to continue to be settled land after the death of the tenant for life: *In re Cugny's Will Trusts* (1); Wolstenholme and Cherry's Conveyancing Statutes, 12th ed. (1932), vol. ii., p. 1034.

For the appropriate purposes of the Settled Land Act,

"convey the land to them, or "assent to the land vesting in "them as joint tenants, and in "the meantime the land shall be "held on the same trusts as would "have been applicable thereto if "it had been so conveyed to or "vested in the trustees."

(1) [1931] 1 Ch. 305.

1925, the settlement is deemed to be still subsisting, and there can still be trustees of the settlement. As personal representative of the testator, the applicant is the present trustee of the settlement, and he can require the personal representative of the tenant for life to assent to the property vesting in him.

E. M. Winterbotham for the respondent, Eleanor Roberts. The applicant is not entitled to call upon the respondent to transfer the property to him. It is submitted, in the first place, that in this case there are no trustees for the purposes of the Settled Land Act, 1925. Under s. 30, sub-s. 3, the testator's widow became trustee of the settlement on the coming into operation of the Act on January 1, 1926. On her death in 1931 there were no trustees of the settlement, because it had come to an end. The land is no longer settled, and it would be impossible to execute a vesting deed under s. 5 of the Act: *In re Alefounder's Will Trusts.* (1) Sect. 30, sub-s. 3, of the Act had no further operation, after the settlement came to an end.

In the alternative, it is submitted that, if there is any trustee of the settlement, it is the personal representative of the tenant for life. If there is any notional continuation of the settlement, the respondent is the Settled Land Act trustee, and not the applicant. The respondent would be the successor in office of the testator's widow under s. 33, sub-s. 1, of the Settled Land Act, 1925. See also s. 18 of the Trustee Act, 1925.

In re Cugny's Will Trusts (2) does not apply to the present case, as the facts there were different. Moreover, in *In re Cugny's Will Trusts* (2) Maugham J. decided that the assent should be made in favour of the trustees of the testatrix's will, and not in favour of "the trustees of the settlement."

There are accordingly no grounds upon which the administratrix of the tenant for life can be called upon to convey the property to the personal representative of the testator, and the applicant is not entitled to the order which he desires to obtain.

(1) [1927] 1 Ch. 360, 362, 363.

(2) [1931] 1 Ch. 305, 309.

1939. Feb. 2. BENNETT J. This is a summons taken out in the matter of the Settled Land Act, 1925, by the personal representative of a testator named John Thomas. The respondent to the summons is a lady named Eleanor Roberts, a daughter of the testator, and the legal personal representative of the testator's wife. The applicant asks for an order that the property described in the schedule, two dwelling-houses in Anglesey, "being property formerly subject to the settlement "created by the" testator's will "but now held in trust for "the children of the" testator "who are entitled in possession "in undivided shares may vest in the applicant the trustee "of the said settlement for the purposes of the above-mentioned "Act in its entirety for the estate therein now vested in the "said Eleanor Roberts to be held by the said" applicant "upon the statutory trusts upon which the same ought to be "held pursuant to the said Act."

The testator made his will on August 25, 1913. He appointed his wife, Ann Thomas, to be his executrix; he gave and bequeathed to his wife all his real and personal estate for her sole use and benefit during her life and after her death to be equally divided between his surviving children so long as they should do right by their mother, excepting the household furniture and effects, which after her mother's death he left to his daughter Mary Emma if still unmarried. He died on December 3, 1915; probate was granted to his widow, Ann Thomas, on March 9, 1916. The two dwelling-houses in Wales were part of his residuary estate. His widow died on November 21, 1931. On April 18, 1932, the widow having died intestate, letters of administration to her estate were granted to the respondent, her daughter and a daughter of the testator. On October 14, 1938, letters of administration with the will annexed to the estate of the testator, John Thomas, were granted to the applicant as the lawful attorney of a Mrs. Caldwell for her use and benefit until she should apply for and obtain letters of administration; and that she has not done.

Now, the case for the applicant is of the simplest possible character. He says that he is the legal personal representative of the settlor. It is common ground between the parties that the land on the widow's death vested in the respondent, as her legal personal representative; and it is common ground between the parties that upon the death of the testator's widow the settlement came to an end, and that the land then became subject to a trust for sale. The applicant puts his case in this way: First he refers to sub-s. 3 of s. 30 of the Settled Land Act, 1925. That sub-section reads as follows: "Where "a settlement is created by will, or a settlement has arisen "by the effect of an intestacy, and apart from this subsection "there would be no trustees for the purposes of this Act of "such settlement, then the personal representatives of the "deceased shall, until other trustees are appointed, be by "virtue of this Act the trustees of the settlement, but where "there is a sole personal representative, not being a trust "corporation, it shall be obligatory on him to appoint an "additional trustee to act with him for the purposes of this "Act, and the provisions of the Trustee Act, 1925, relating "to the appointment of new trustees and the vesting of trust "property shall apply accordingly."

He says: Here was a settlement created by will. But for this sub-section there would be no trustees for the purposes of this Act of such settlement. I am the personal representative of the deceased, the settlor, who made the will; and therefore I am, until other trustees are appointed, trustee of the settlement by virtue of this Act. I cannot act because before I can do so I must appoint an additional trustee. Nevertheless, by virtue of s. 30, sub-s. 3, that is my position. Now, that being my position, the next statutory provision upon which I rely as entitling me to the order for which I ask is s. 36, sub-s. 1, of the Settled Land Act, which provides that: "If and when, after the commencement of this Act, "settled land is held in trust for persons entitled in possession "under a trust instrument in undivided shares, the trustees "of the settlement (if the settled land is not already vested "in them) may require the estate owner in whom the "settled land is vested (but in the case of a personal repre-"sentative subject to his rights and powers for purposes of "administration), at the cost of the trust estate, to convey the "land to them, or assent to the land vesting in them as joint "tenants, and in the meantime the land shall be held on the "same trusts as would have been applicable thereto if it "had been so conveyed to or vested in the trustees."

What the applicant says with regard to that sub-section is this: that the land is at the moment held in trust for persons entitled in possession under a trust instrument in undivided shares, and although subject to those trusts, it is still notionally for the purposes of the Act to be regarded as settled land. The respondent is the estate owner and, in those circumstances, subject to her rights as personal representative in regard to various matters connected with the estate of the tenant for life, as administratrix, the applicant claims that he is entitled to call upon her to convey the land to him or to assent to the land vesting in him.

Now, the only question—and it is the only ground upon which Mr. Winterbotham attacks the applicant's argument—is whether, having regard to the limitations of the will and the events which have happened, it can be said that the two dwelling-houses in question are still settled land, they being at the moment subject to a trust for sale. The answer to that question, I think, is to be found in the decision of the present Lord Chancellor when he was sitting as a judge in a Court of first instance in *In re Cugny's Will Trusts.* (1) I think he put upon s. 36, sub-s. 1, the interpretation which Mr. Walmsley asks me to put upon it. If that be (as I hold it is) the interpretation which ought to be put upon it, then it seems to me that there is the right vested in the applicant as the personal representative of the settlor to call upon the estate owner to assent to the settled land vesting in him. Accordingly I make the order asked for by the applicant.

Solicitors: *William Charles Crocker, for Wood, Lord & Co., Manchester; T. D. Jones & Co., for J. S. Laurie & Co., Llangefni.*

(1) [1931] 1 Ch. 305.

F. R. R. B.

BENNETT J.

1938

Jan. 13, 14, 18, 19; *Oct.* 13, 14, 18, 19, 20, 21, 25, 26, 27, 28; *Nov.* 1, 16, 17.

1939

Feb. 16.

BRADFORD THIRD EQUITABLE BENEFIT BUILDING SOCIETY *v.* BORDERS.

[1937. B. 2496.]

Building society—Mortgage—Advance on security of house coupled with collateral security given by builder—Whether ultra vires—Building Societies Act, 1874 (37 *&* 38 *Vict. c.* 42), *ss.* 13, 25.

A building society advanced a sum of money to the purchaser of a house on the security of the house coupled with a collateral security from the builders on a fund provided by the builders to secure loans by the society to the purchaser and other persons who bought houses from the builders. The amount so advanced was in excess of the normal amount which the society would have advanced on the security of the house alone:—

Held, that the directors of the society had, in making the advance, infringed the rules of the society, but that the transaction between the society and the purchaser was not outside the powers of the Building Societies Act, 1874, and was, therefore, not an illegal or invalid transaction or one which the society could not enforce.

ACTION.

The Bradford Third Equitable Benefit Building Society, which was incorporated in 1875 under the Building Societies Act, 1874, sued Mrs. Elsy Borders, the owner of a house at Kingsway, West Wickham, Kent, for recovery of possession of the house under an attornment clause contained in a mortgage deed dated October 10, 1934, whereby the plaintiffs were at liberty at any time after the power of sale had arisen to enter without previous notice.

The Court held that the society had failed to prove that the mortgage deed put forward by them was executed by the defendant, and dismissed the action.

It therefore became unnecessary to decide a legal question which arose out of the defence, but the learned judge stated his conclusions on the question, in case the matter were taken to the Court of Appeal.

The facts are, therefore, stated only so far as they are material to this question.

The plaintiffs lent the defendant 693*l.*, taking from her a mortgage of the house. The normal amount which they

BENNETT J.

1938

BRADFORD THIRD EQUITABLE BENEFIT BUILDING SOCIETY *v.* BORDERS.

would have advanced on the security of her house, which, with the garage, had been valued at 730*l.*, was 545*l.* They advanced 693*l.* because, in addition to the security of her house, they had a collateral security from the builders on a fund provided by the builders to secure loans by the plaintiffs to the defendant and other persons who bought houses from the builders. This agreement was made on March 3, 1934.

On October 17, 1934, a pooling agreement was made, between the builders and the society, under which the sum of 37*l.* (which related to the sum advanced to the defendant) was, with forty-nine other sums deducted from the sums supposed to have been advanced by the society to forty-nine other borrowers, made a collateral security provided by the builders for money advanced by the society to the defendant and forty-nine other borrowers.

R. F. Roxburgh K.C. and *M. G. Hewins* for the society. The question relating to collateral security is one which affects every building society. It is a matter of policy which has the approval of Parliament. There are three systems of making advances. The original system was to advance 75 per cent. on the security of the house alone. There is a system of advancing 90 per cent. on the security of the house and an indemnity insurance policy. With regard to the 95 per cent. system, with which this case is concerned, the amount was advanced on the security of the house and of a pooling agreement between the builders and the building society. The question of ultra vires may be raised in connection with collateral security of insurance policies, but it does not arise in this case.

The defendant (appearing in person). The mortgage transaction is prohibited by statute. It is therefore illegal and cannot be acted on by the society. According to the Building Societies Act the society is precluded from advancing money except on landed property. A transaction of this kind is not expressly authorized by the Act, and anything not expressly authorized is prohibited, particularly where the statute is for the protection of the public.

R. F. Roxburgh K.C. in reply.

1939. Feb. 16. BENNETT J. [stated the material facts and continued :] The question is whether the transaction between the plaintiffs and the defendant is rendered invalid and unenforceable because of these collateral agreements. In support of her contention the defendant relies on the provisions of the Building Societies Act and the rules of the plaintiff society, asserting that the plaintiffs have infringed both the rules and the provisions of the statutes.

The relevant provisions of the Building Societies Acts referred to were ss. 13 and 25 of the Building Societies Act, 1874, and s. 13, sub-s. 1, and s. 17 of the Building Societies Act, 1894. Sect. 13 of the Act of 1874 is as follows : " Any "number of persons may establish a society under this Act, "either terminating or permanent, for the purpose of raising "by the subscriptions of the members a stock or fund for "making advances to members out of the funds of the society "upon security of freehold, copyhold, or leasehold estate, by "way of mortgage ; and any society under this Act shall, so "far as is necessary for the said purpose, have power to hold "land with the right of foreclosure, and may from time to "time raise funds by the issue of shares of one or more "denominations, either paid up in full or to be paid by "periodical or other subscriptions, and with or without "accumulating interest, and may repay such funds when no "longer required for the purposes of the society. Provided "always, that any land to which any such society may "become absolutely entitled by foreclosure, or by surrender, "or other extinguishment of the right of redemption, shall "as soon afterwards as may be conveniently practicable be "sold or converted into money."

Sect. 25 provides that : " Any society under this Act may "from time to time, as the rules permit, invest any portion of "the funds of the society not immediately required for its "purposes, upon real or leasehold securities, or in the public "funds, or in or upon any parliamentary stock or securities, "or in or upon any stock or securities payment of the interest

BENNETT J.

1939

BRADFORD THIRD EQUITABLE BENEFIT BUILDING SOCIETY *v.* BORDERS.

"on which is guaranteed by authority of Parliament, or in "the case of terminating societies, with other societies under "this Act; and for the purpose of investments in the public "funds or upon security of copyhold or customary estate, "the society, or the board of directors or committee of "management thereof, may from time to time appoint and "remove trustees." Sect. 13, sub-s. 1, of the Act of 1894 provides that: "A society under the Building Societies Acts, "shall not advance money on the security of any freehold, "copyhold, or leasehold estate which is subject to a prior "mortgage, unless the prior mortgage is in favour of the "society making the advance." Sect. 17 provides that: "The "powers of investment under section twenty-five of the "Building Societies Act, 1874, shall include power to invest "in or upon any security in which trustees are for the time "being authorized by law to invest." Since the transaction between the plaintiffs and the defendant was not an investment of a portion of the funds of the society not immediately required for its purpose I am not concerned with s. 25 of the Act of 1874, nor with s. 17 of the Act of 1894.

Sect. 13 of the Act of 1874 is the only statutory provision which needs to be considered and applied. That section confines the activities of a building society to very narrow limits. The fund of money raised by the subscriptions of members can be advanced only to members of the society and to them only on the security of freehold and leasehold estate by way of mortgage. The provisions of the section were considered by Stirling J. in *Sheffield and South Yorkshire Permanent Building Society* v. *Aizlewood.* (1) That was a case in which a building society in liquidation sought to make directors liable for losses incurred in connection with a loan of 25,000*l.* made on a mortgage of a leasehold colliery and as collateral security a charge on certain beneficial interests in personal estate.

It was there contended that the inclusion in a mortgage of leasehold of a collateral charge on personal estate invalidated the whole transaction. The decision of the learned judge

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(1) (1889) 44 Ch. D. 412, 451.

BENNETT J.

1939

Bradford Third Equitable Benefit Building Society v. Borders.

was that it did not. The passage in his judgment in which he dealt with the question is as follows (1): "It was next "said that the advance was not made exclusively on the "security of leasehold estate, but was made partially on the "security of the interests of Mrs. Joseph and her children "in the funds held on the trusts of the two settlements of 28th "of September, 1876, and the 15th of January, 1877. It was "said that those interests constituted an essential and integral "part of the securities taken by the Plaintiff society, and "that reliance was placed upon them by the directors; and "it was contended that the inclusion of those interests in "the securities vitiated the whole transaction—that, in fact, "the inclusion of any personal element in the security would "vitiate such a transaction. If this contention were well "founded, then it would seem to follow that the inclusion in "a building society's mortgage of a personal covenant by the "mortgagor for repayment of the advance, and reliance placed "by the officers of the society on the solvency of the mort-"gagor, might equally vitiate any transaction of which those "were elements. Yet it was not disputed in argument, and "in my judgment properly, that a building society making "an advance to a member on the security of freehold, copyhold, "or leasehold estate, might take from him a personal covenant "for payment of what might be due from him to the society; "and I think that the officers of the society might, to a certain "extent, and for certain purposes, rely on the solvency of "the mortgagor. For example, an action on the covenant of "a solvent borrower affords an effectual and comparatively "speedy and inexpensive mode of recovering what is due, "and may be the means of avoiding the delay, costs, and "liability incident to remedies (such as foreclosure, sale, or "entry into possession) available only against the subject-"matter of the security. If the circumstances of the borrower "are such that his personal covenant is without value, the "building society may, in my opinion, secure a like advantage "by means of the personal guarantee of a third party or a "charge on some readily available pure personal estate. The

(1) 44 Ch. D. 412, 451.

"benefit so obtained must, however, be purely collateral, and "the validity or propriety of the transaction is to be tested "as if no such ingredient entered into it. If there be no "freehold, copyhold, or leasehold estate comprised in the "security, or if the estate so comprised be merely nominal, "or its value out of all proportion to the amount advanced, "the transaction is beyond the powers of the society, and "invalid; but where, as here, the borrower offers as security "such estate to a substantial extent, an advance is within "the powers conferred by the Act of 1874, and the question "for the officers of the society to determine is what amount "may properly be advanced."

That decision is against the defendant's contention. The terms of the section were again considered by Lindley L.J. in delivering the judgment of the Court of Appeal in *Cullerne* v. *London and Suburban General Permanent Building Society*. (1) In that case the question arose on a counterclaim by the defendant society against the plaintiff, a director, for having concurred in a resolution authorizing advances to members of the society on their shares. An advance was made to a member on his shares and a loss was incurred. The plaintiff was no party to the actual advance. The decision was that the plaintiff was not liable, for the cause of the loss was the wrongful act of the directors who made the advance, not the passing of the resolution. But Lindley L.J. did express his opinion on the powers of the society in very clear terms. He said (1): " On looking carefully at the statutes by which "these societies are governed, viz., 6 & 7 Wm. 4, c. 32, s. 4 "—and the previous statutes there referred to, viz., 10 Geo. 4, "c. 56, ss. 2, 13, 30, and 31, and 4 & 5 Wm. 4, c. 40, s. 9, "it certainly does appear that building societies can only "advance money on the security of landed property, freehold, "copyhold, or leasehold. The later Act, 37 & 38 Vict. c. 42, "ss. 13 and 25, is to the same effect, except that the public "funds are added."

This is all the authority on the interpretation and effect of the statutory provisions, and guided by it and with the

(1) (1890) 25 Q. B. D. 485, 488.

language of the section in mind I conclude that the mortgage in question is not beyond the powers of the society. It is a mortgage of freehold estate. The security of the freehold estate is not merely nominal. As between the plaintiffs and the defendant the transaction is one of loan on the security of freehold property. It is not a case in which freehold land has been added to unauthorized security merely to make it appear that the transaction was one of loan on authorized security when the truth was otherwise. I express no opinion on the validity of the pooling agreement between the plaintiffs and the builders, or on the validity of the collateral charges given by the builders to the plaintiffs. The validity of those transactions depends upon quite different considerations. And those considerations are not raised by the defendant's defence.

There remain to be considered the rules of the plaintiff society. The relevant ones are rules 1, 23, and 24. These read as follows: "1. The name of the society shall be the "'Bradford Third Equitable Benefit Building Society,' and "it is established on the permanent principle; its objects "being to receive money on investment as subscriptions and "loans, and out of the funds so raised to make advances on "the security of freehold or leasehold estate by way of "mortgage, pursuant to the Building Societies Acts." Rule 23 is: "Any person desirous of receiving an advance, or of "ascertaining what amount will be advanced, upon any property, "shall give to the secretary, on a form supplied for the purpose, "a description of the premises intended to be offered as "security. The surveyor's fee for inspection of the property "must be paid at the same time, and his report thereon shall "be confidential, and for the sole use of the directors and "officers." Rule 24 states: "When the directors are of "opinion that the premises are a sufficient security, and the "solicitor has certified that the title to the property is satisfactory, the amount granted shall be paid to the borrower, "on his executing a mortgage of the premises in such form "and with such conditions as the solicitor shall require, and "depositing the same, with all other title deeds, with the "society."

The rules, I think, narrow, so far as the plaintiffs are concerned, the limits imposed on building societies in general by s. 13 of the Act of 1874. The Act merely confines the securities on which the funds of a society may be advanced to mortgages of freehold or leasehold land. The rules impose a limit on the amount of money which the directors of the plaintiffs may advance out of the plaintiffs' moneys on such securities. Rule 23 in effect provides that the land proposed as security for a loan is to be valued by the plaintiffs' surveyor. The meaning of rule 24, in my judgment, is to limit the amount the directors may advance out of the plaintiffs' moneys to such an amount as they think can be recovered out of the land taken as security, without regard to anything else. In my judgment, if in fixing the amount to be advanced the plaintiffs' directors have regard to collateral security provided by a third party, they violate the terms of rule 24. In the present case, on the facts proved, the directors of the plaintiffs would not have advanced to the defendant 693*l.* on the security of the house without collateral security. The minutes of their meeting of July 16, 1934, show that they would not have advanced more than 545*l.* on the security of her house alone. In my judgment, the directors of the plaintiffs have, therefore, broken the plaintiffs' rules. But a mere violation by the directors of the plaintiffs of the plaintiffs' rules will not invalidate a transaction. The rule is narrower than the law requires it to be. So long as the transaction between the plaintiffs and the defendant is not outside the powers of the plaintiffs as defined by the Act of Parliament it is not, in my judgment, an illegal or invalid transaction or one which the plaintiffs cannot enforce.

Solicitors: *Henry Boustred & Sons, for J. Eaton & Co., Bradford.*

J. L. D.

Applied. Re CUNLIFFE-OWEN (*decd.*).
[1951] 2 All E.R. 220.

BENNETT J.

1939
March 10.

In re NORBURY (DECEASED).

NORBURY *v.* FAHLAND.

[1938. N. 1682.]

Will—Construction—Legacy given free of duty—Legatee domiciled abroad—Incidence of foreign duty—Direction referable to English duty only.

Where an English testator by an English will gives a pecuniary legacy "free of duty," the only duties payable out of his estate in respect of the legacy are those imposed by English law, in the absence of any contrary intention expressed in the will.

SUMMONS.

By his will dated June 13, 1935, the testator, John Norbury, appointed the plaintiffs the executors and trustees thereof, and after bequeathing a legacy to his wife and a settled legacy to his daughter and her issue, bequeathed free of duty the sum of 15,000*l.* to his trustees with powers of appropriation of securities and investment upon trust to pay the income thereof to Frau Mita Armska Esterhazy Fahland (whose address was given as in Berlin) during her life without power of anticipation during any coverture and on her death the said trust legacy was to fall into and form part of the testator's residuary estate. The testator devised and bequeathed all his residuary estate to his trustees upon trust for conversion and to pay and provide for his funeral and testamentary expenses and the legacies bequeathed by his will or by any codicil thereto and the duties on all legacies and annuities bequeathed free of duty, and subject thereto to divide the residue equally between his three nieces and his nephew therein named.

The testator made two codicils to his will, respectively dated August 20, 1936, and March 15, 1937, neither of which affected the legacy given to Frau Fahland. By the second codicil the testator revoked the residuary gift contained in the will, and gave the residue upon trust for his wife for her life and after her death for his daughter and her issue.

The testator died on May 5, 1937, and his will and codicils were proved on July 16, 1937, by the executors.

Frau Fahland was a German national residing in Berlin, and at the date of the will had been resident there for many years. Under German law a tax known as the inheritance tax was payable by her in respect of the settled legacy of 15,000*l.* She claimed that the expression " free of duty " in the gift of the legacy to her included freedom from such inheritance tax.

The plaintiffs took out this summons for the determination of the question whether they as executors ought to pay the German inheritance tax on the legacy out of the testator's estate, or recoup to Frau Fahland the amount of any duty paid by her on the legacy, or whether the freedom from duty in the clause referred to did not extend to the German inheritance tax.

There was evidence by Dr. E. J. Cohn, a German lawyer, that inheritance tax was payable by any one living in Germany in respect of all property acquired by such person under a will or an intestacy or a donatio inter vivos or a donatio mortis causa. It was payable at the rate of 20 per cent. on the value of Frau Fahland's life interest in the legacy. The beneficiary was the only person liable to pay the tax, which was payable notwithstanding that the property acquired came from a person living outside Germany and the assets out of which the interest came were situate in a country other than Germany. The tax was levied from time to time on the income as received.

Wilfrid Hunt for the plaintiffs.

L. W. Byrne for the defendant Frau Fahland. The expression " free of duty " has no general meaning as applied to all wills but is a comprehensive term and, it is submitted, includes the German inheritance duty in the present case. The testator knew the legatee was a German living in Germany, and he intended her to receive the clear income of the capital sum free of any kind of death duty. There is no authority exactly in point, but *In re Scott* (1) was the case of a legacy in an English will given free of legacy duty which disposed of valuable chattels in France on which the legatee had to pay

(1) [1915] 1 Ch. 592.

the French " mutation " duty, a similar duty to this inheritance duty. This decision turns on the use of the expression " legacy duty," but the case was argued upon the footing that it was a matter of construction whether the words used could include foreign duties.

N. D. Ouvry for the residuary legatees was not called upon.

BENNETT J. I am told that there is no direct authority upon the question raised for decision by the summons now before me. The point is not covered by the decision of the Court of Appeal in *In re Scott.* (1) An English testator must be presumed to know something about the duties the English law imposes both upon his estate and upon beneficiaries under his will when he dies ; but not many of them, I suppose, know much if anything about death duties imposed by the laws of foreign countries. Nor, I suppose, would many of them contemplate some additional burden being imposed upon their estates by a change of residence on the part of a person to whom a legacy had been given. In the absence of authority, I hold that, where an English testator by an English will gives a pecuniary legacy "free of duty," the only duties payable out of his estate in respect of the legacy are duties imposed by English law, unless there are words in the will which make it clear that duties imposed by the law of a foreign country are to be paid thereout.

Solicitors : *Ouvry & Co.*

(1) [1915] 1 Ch. 592.

H. L. L.

TRANSPORT AND GENERAL CREDIT CORPORATION, LIMITED *v.* MORGAN.

SIMONDS J.

1939

Feb. 21, 22, 23.

[1938. R. 1688.]

Contract—Hire-purchase finance agreement—Trust deed to secure repayment of notes—Notes issued and taken up by group of financial companies—Default in repayment—Appointment of receiver—Action to enforce security—Claim to prior lien for unpaid purchase-money of goods—Whether security valid or unenforceable—Moneylenders Act, 1900 (63 *&* 64 *Vict. c.* 51), *s.* 6 (*d*)—*Moneylenders Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 21), *s.* 17—*Companies Act,* 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 266.

A company, W., engaged in selling wireless sets and other goods on the hire-purchase system, formed a subsidiary company R., of which it owned all the capital, and which it entirely controlled, in order to finance the business. It was agreed between W. and R. that, whenever a customer proposed to obtain any goods from W. on the hire-purchase system, W. would immediately sell the goods to R. and R. would let them to the customer with an option of purchase on payment by instalments. R. appointed W. its attorney to collect instalments and for all the purposes of the agreement.

By a trust deed made between R., W. and C. and F. as trustees, R. covenanted to lodge all hire-purchase agreements entered into by them with C. and F. and charged in their favour all its assets, present and future, as a floating charge to secure the repayment of notes to be issued by R. and certified by C. and F. as trustees.

By an agreement of the same date made between R., W. and several financial companies, of which one was the plaintiff company, the companies undertook for a period of one year from the date of the agreement to take up and discount notes so issued and certified, in certain proportions, but not to exceed the total of 50,000*l.* in the case of any one company. The notes were issued against hire-purchase agreements and were for repayment at the end of three, four or five months with interest thereon at the rate of 10 per cent. per annum.

Six months after the date of these deeds R. defaulted in the payment of certain notes, and C. and F. gave notice to R. that the whole amount outstanding thereupon became due and payable, and appointed a receiver. Resolutions were then passed for the voluntary winding-up of both companies, W. and R. :—

Held, in an action by the plaintiffs, on behalf of themselves and all other holders of notes under the trust deed, to enforce the security thereby created,

(1.) that the assets forming the security for the notes were not subject to any prior lien in favour of W. as vendors for unpaid purchase-money. The vendor's equitable lien has no application to the sale of ordinary commercial goods, and the only lien applicable to the sale of such goods is that conferred by the Sale of Goods Act, 1893.

(2.) The trust deed having been executed more than six months before the date of the winding-up of R., any notes issued under it were not invalidated by s. 266 of the Companies Act, 1929.

(3.) The plaintiffs were not carrying on the business of moneylenders, and the transaction was not a moneylending transaction which would be invalidated under the Moneylenders Acts, 1900 to 1927.

Held, therefore, that the defences failed and the plaintiffs and other noteholders were entitled to enforce their security.

Esberger v. *Capital & Counties Bank* [1913] 2 Ch. 366 followed on the second point.

ACTION.

The facts were stated by the learned judge in his judgment as follows: In this case the plaintiffs, Transport and General Credit Corporation, Ld., a limited company formerly called the Transport Credit Corporation, Ld., seek to enforce their rights under certain trust notes issued by the defendant company, Rawire, Ld., under the provisions of certain trust deeds which are set out in the title to these proceedings, the one being dated July 14, 1937, and the other, supplemental thereto, being dated November 30 of the same year.

The defendants to the proceedings are Mr. Henry Morgan, who, under the provisions of the trust deed, was duly appointed receiver, Mr. Colesworthy and Mr. Fitzgerald, who are trustees of the two trust deeds which I have mentioned, Rawire, Ld., the company which issued the notes, Warner's Radio and Electric, Ld., a company closely associated, as I shall presently have to point out in detail, with Rawire, Ld., who were parties to the trust deed for the purpose of guaranteeing the notes, and finally, Mr. Dulanty and Mr. Williams, who are trustees of a second trust deed to secure certain second charges.

The action is one which is in a form very familiar in these Courts. It is the form of action adopted to enforce the rights of debenture holders or debenture stockholders where debentures or debenture stock have been issued by a limited company, and in this case the plaintiffs sue on behalf of themselves and all other holders of notes secured by the deeds in question but, as will presently appear, there are certain aspects of the case which make it difficult perhaps to treat this in all respects as a representative action.

It is necessary to refer to the trusts of the deed and to the terms of the notes which the plaintiffs seek to enforce, and I need only say that the notes issued by the defendant company, Rawire, Ld., and now outstanding, secure a sum of, I think, some 290,000*l.*, and the plaintiffs themselves are holders of notes which secure over 50,000*l.*, so that very large sums are at stake.

The trust deed of July 14, 1937, to which were parties Rawire, Ld. (which I will call Rawire), the trustees, and Warner's Radio and Electric, Ld. (which I will call Warner's), recites the incorporation of Rawire, its share capital and issued share capital, that the whole of the issued shares of Rawire are owned or held by or on behalf of Warner's and the borrowing powers of Rawire under the memorandum. It then states that Rawire's sole business consists of the purchase, on terms and conditions which by a certain agreement of June 8, 1936, had been mutually agreed between Warner's and Rawire, from Warner's and a certain other company of certain goods, including radio sets, and the subsequent entering into agreements for hire or hire-purchase of those goods. It then recites that, for the purpose of such business and of enabling and assisting the company—that is to say, Rawire—to purchase such goods and commodities and to hire the same and otherwise to finance and assist Warner's and Lawson's—they are the other company—or either of them in relation to the disposal on terms of hire-purchase of goods and commodities for the time being dealt in by either of them, the company propose from time to time to issue notes. Then it recites that Warner's have agreed to join in the deed for the purpose of guaranteeing the due payment by Rawire of the notes. The trust deed proceeds to provide for a covenant by Rawire to assign to or lodge with the trustees and pledge to them, and keep so pledged up to the amount thereinafter mentioned, agreements of hiring or hire-purchase covering certain transactions. It then proceeds to charge in favour of the trustees all the other assets, a floating charge covering all the assets of the company, in general terms.

Clause 4 provides that the company's notes which are to be issued as I have stated are to be certified by the trustees, and that no note shall be deemed to be secured by the trust deed unless it is so certified. The limit within which the trustees may certify is stated, elaborate provisions being contained in the document for limiting the amount which may from time to time be issued on these notes. By clause 10 the company and Warner's are to keep proper books and to give the trustees facilities for inspection and examination of them. By clause 11 Rawire appoint the trustees to be the joint and several attorneys and attorney of the company, to execute, sign and do all deeds, instruments and things which may be necessary or expedient, and it then provides, in the common form, for the security becoming effective, among other things, on the failure of the company to pay any moneys represented by the company's notes according to their tenor, purport and effect.

Clause 14 provides that on the security becoming enforceable the trustees may by notice in writing to the company declare all of the company's notes then outstanding and not then matured to be due and payable immediately and by clause 15, on the security becoming enforceable, the trustees shall be at liberty forthwith to sell any of the specifically mortgaged assets and to enter on and take possession of the whole of the property subject to the floating charge.

Clause 18 provides for the disposition by the trustees of the moneys to arise by sale, and clause 21 provides that after the security has become enforceable the trustees may appoint any person to be receiver of the specifically mortgaged assets or the general assets of the company.

By clause 30 Warner's guarantee the due payment, according to the tenor, purport and effect, of each and every of the company's notes, and clause 31 provides that Warner's shall not, during the continuance of the agreement, without the previous consent in writing of all the holders for the time being of the company's notes, execute or create any mortgage or charge on their assets.

The terms of that deed sufficiently indicate what is emphasized by the document to which I shall refer presently —namely, how intimate was the association of Rawire and Warner's.

The form of the note on which the plaintiffs sue is scheduled to that trust deed, and the notes were in fact issued in this form. They provided that Rawire would on a future date (and that date was always four, five or six months after the date of the issue of the notes) pay to the bearer at the place therein specified the sum therein mentioned, which was in fact a sum equivalent to the amount advanced, plus 10 per cent. to the date of maturity; and the notes provided, as such notes usually do, that the holders of the said notes were to be entitled pari passu to the benefit of the security created by the trust deed and of the trusts therein contained. The trust deed also contained, in a second schedule, the form of certificate which the trustees were to give on the issue of the notes.

This is a straightforward and simple document, and it is only necessary to refer, in connection with it, to a contemporary document from which it appears that the plaintiffs and the other persons who took up the notes bound themselves to do so. That is a document dated July 14, 1937, the same day, the parties to which were, first, Rawire, secondly, Warner's, and, thirdly, a number of companies to which I may refer compendiously as the finance group, including the plaintiff company.

That agreement recites that it is collateral to the trust deed to which I have just referred, and provides as follows: That for the period of one year from the date thereof the several members of the finance group would respectively take up and discount notes issued by the company and countersigned by the trustees as provided by the said trust deed, up to but not exceeding the amount of the effective working capital of Warner's as defined by the trust deed, in the proportions set forth in the first schedule to the agreement.

In the first schedule to that agreement one finds the names of the several members of the finance group, and the proportions in which they bound themselves to take up the notes which were duly issued, and I notice that the plaintiff company bound themselves to take up 50/290ths of the issued notes, subject to a maximum of 50,000*l*.

The agreement further provided, by clause 3, that Warner's and Rawire jointly and severally undertook to agree with the finance group and with the individual members thereof severally that Warner's and Rawire would during the currency of the agreement and so long as any of the company's notes remained unsatisfied maintain in full force and effect and would respectively observe and perform in all respects the several terms and conditions of an agreement of June 8, 1936, between Warner's and Rawire, a copy of which was contained in the schedule. To that document I shall have to refer at a later stage.

Further, those two companies, Warner's and Rawire, agreed that forthwith and from time to time thereafter the company, that is to say, Rawire, would pledge to and deposit with the trustees under the said trust deed, and keep pledged and deposited, all existing and future agreements of hiring or hire-purchase, and would issue trust notes only to the then existing trust noteholders so long as they should be willing to take them up and discount them.

There is a provision in clause 5 with regard to the sale and discounting by the members of the finance group of the notes. I think there is nothing else in that document to which I need refer.

That being the trust deed and that the collateral agreement, notes were duly issued in accordance with its terms, but within a short time Warner's and Rawire fell on evil days, and as early as February, 1938, that is to say, within a little more than six months of the execution of the trust deed, they made default in payment of certain notes. On that the trustees made the declaration contemplated by the trust deed, as a result of which all the trust notes became due and payable, and on February 18, 1938, in accordance with the terms of the trust deed, they duly appointed Mr. Henry Morgan to be receiver both of the specifically mortgaged assets and of the general property and undertaking of the company. He went into possession. He received (whether under the specific charge or under the general charge does not matter for this purpose) all the assets of Rawire, including certain chattels which, although at one time subject to hire-purchase agreements, had been taken back by Rawire. Under the terms of then extant hire-purchase agreements he received instalments as they became due; he himself, by himself or by his duly appointed agents, recovered possession of other chattels the subject of hire-purchase agreements where the hirer had made default or had determined the agreement; and he further received the proceeds of sale of certain articles which he himself had sold.

On March 16, 1938, there was a valid resolution for the winding-up of Warner's, a creditors' voluntary winding-up; and on May 12, 1938, a similar resolution was passed with regard to Rawire. Both those companies accordingly are in liquidation, and they have the same liquidators, Mr. Lean and Mr. Latham.

Sir William Jowitt K.C., *W. P. Spens K.C.*, *Wilfrid Hunt* and *M. L. Gedge* for the plaintiffs. The transaction is of a novel type, and it is said by the defendants that it is moneylending within the Moneylenders Acts, 1900 to 1927. It may be the lending of money on security, but it is submitted that it is not a moneylending transaction.

The question is one that may be divided into three distinct points: (1.) is this a moneylending transaction; (2.) if it is so, is it a transaction by a moneylender; (3.) if it is so, does it or does it not come within the exception contained in s. 6 (*d*) of the Act of 1900, that of "bona fide carrying on "any business not having for its primary object the lending "of money"?

It is very difficult to see how such a purely commercial transaction as the present can be brought within the Moneylenders Acts. For what is a moneylender and a moneylending

SIMONDS J.

1939

Transport and General Credit Corporation *v.* Morgan.

business see *Bonnard* v. *Dott* (1) and *Litchfield* v. *Dreyfus.* (2) The question whether any person is carrying on a moneylending business is a question of fact : *Newton* v. *Pyke.* (3) In *Samuel* v. *Newbold* (4) Lord Macnaghten said that the question was one that any man of common sense was capable of deciding provided he was not hampered by authorities, which required training to discriminate. The fact that a pawnbroker has lent money on a bill of sale does not by itself make him a moneylender within the Acts : *Newman* v. *Oughton.* (5) See also *Automobile and General Finance Corporation* v. *Morris* (6), where it was held that a person who financed hire-purchase agreements by buying motor-cars and letting them out on hire-purchase was not a moneylender.

A more recent case dealing with the finance of hire-purchase is *In re George Inglefield & Co., Ld.* (7), where Eve J. held that agreements for the sale of goods to a discount company, subject to a hire-purchase agreement in each case, were charges which ought to have been registered under s. 79 of the Companies Act, 1929, and not having been so registered were void; but the Court of Appeal reversed that decision, holding that they were contracts for sale and purchase. It was not suggested in that case that the transaction was one of moneylending.

The question whether an agreement to finance hire-purchase transactions made directly with the dealer was moneylending was raised in *Olds Discount Co., Ld.* v. *John Playfair, Ld.* (8), and a very similar case was *Olds Discount Co., Ld.* v. *Cohen* (9), reported in a note to the former. It was held in each case that an agreement for the purchase of book-debts was not a moneylending transaction. In the former case Branson J. said that it was perfectly clear that the transaction was not a moneylending one : "It is the nature of the agreement "entered into, and not its object, at which the Court has to "look." Each case depends on its own facts, and on the facts of this case the transaction was not one of moneylending at all.

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(1) [1906] 1 Ch. 740.

(2) [1906] 1 K. B. 584, 585.

(3) [1908] 25 T. L. R. 127.

(4) [1906] A. C. 461, 469.

(5) [1911] 1 K. B. 793.

(6) (1929) 73 Sol. Jo. 451.

(7) [1933] 1 Ch. 1.

(8) (1938) 159 L. T. 332.

(9) (1937) 159 L. T. 335.

Another defence set up by the defendants Warner's is that a considerable balance is due from Rawire, Ld., to them for goods sold, and they claim a vendor's lien for unpaid purchase-money as a charge ranking in priority to the floating charge created by the trust deed. The only vendor's lien applicable to the sale of goods is the possessory lien under ss. 41 to 43 of the Sale of Goods Act, 1893, and it is only while the seller remains in possession of goods which he has sold that the lien operates; if he delivers them to a purchaser or even a bailee, it is gone.

It is no doubt true that the equitable doctrine of a vendor's lien can apply to certain classes of personal property, such as a reversionary interest: see *Davies* v. *Thomas* (1) and *In re Stucley*. (2) But it has never been held to apply to the sale of ordinary commercial goods. If it should apply, however, it has been waived by Warner's: see *Cood* v. *Cood and Pollard* (3) and *Rice* v. *Rice*. (4) Further Rawire, Ld., being entirely controlled by Warner's, Warner's are estopped from setting up such a lien, if it exists.

The charge is not invalidated by s. 266 of the Companies Act, 1929, on the ground that some of the notes issued to the trustees under the trust deed creating it were issued less than six months before the date of the winding-up of Rawire, Ld. The date of the charge is the date of execution of the trust deed, and not that of any note issued under it: *In re Spiral Globe (No. 2), Ld.* (5); *In re New London and Suburban Omnibus Co., Ld.* (6); *Dublin City Distillery, Ld.* v. *Doherty* (7); *Esberger & Son, Ld.* v. *Capital & Counties Bank.* (8)

F. R. Evershed K.C. and *J. B. Lindon* for Warner's Radio and Electric, Ld. This is a contract for the lending of money and therefore it comes within the Moneylenders Acts, unless expressly excepted therefrom. The word "borrow" was used by both parties in all the correspondence leading up to

(1) [1900] 2 Ch. 462.
(2) [1906] 1 Ch. 67, 79.
(3) (1822) 10 Pr. 109.
(4) (1854) 2 Drew. 73.
(5) [1902] 2 Ch. 209.
(6) [1908] 1 Ch. 621, 629.
(7) [1914] A. C. 823.
(8) [1913] 2 Ch. 366.

the loan transaction. It is not a joint commercial venture by the dealer and the financiers, for the latter, so long as they get their interest, are not concerned with the amount of profit made by the dealer.

The trust notes are promissory notes to pay money lent for short terms, at the expiration of from three to six months. There is no evidence that any one discounted the notes, and the business was quite unlike that of bill discounting.

The Moneylenders Act, 1900, may not have contemplated the modern development of hire-purchase finance, but it comes within the definition of moneylending, and it is certainly not excluded under s. 6 (*d*), for it is neither banking, insurance, or any other business not primarily concerned with the lending of money. The decisions in *Olds Discount Co.* v. *John Playfair, Ld.* (1), and *Olds Discount Co.* v. *Cohen* (2) do not apply, as the facts in those cases were quite different. The learned judges decided that those transactions were not moneylending, but sale and purchase.

On the question as to the effect of s. 266 of the Companies Act, 1929, cases have been referred to which dealt with the point when the charge was complete under s. 79, i.e. the date of the execution of a document purporting to create a charge, but the point under s. 266 is different. No charge is created under the trust deed unless and until a note is issued under the certificate of the trustees. In no previous case has this point arisen under s. 266.

Warner's have a possessory lien over the sets sold for unpaid purchase-money, subject to the hire-purchase agreement. It cannot be said that no equitable lien can attach to personal property: see *In re Wait.* (3) In that case Sargant L.J. said: " I desire to dispose of a misapprehension that appeared "to me to underlie a good deal of the argument for the "appellant—namely, that no equitable right or lien of the "kind in question would be given effect to except where a "Court of equity (and now any Court administering equity "and bound by statute to recognize the prevalence of equity)

(1) 159 L. T. 332.
(2) 159 L. T. 335.
(3) [1927] 1 Ch. 606, 646.

"would grant a decree of specific performance in the ordinary "sense. Courts of equity when enforcing a contract to assign "or charge an identified property caused that very property "to be assigned or charged, and did not leave the assignee "or chargee to his mere right of damages against the assignor." An unpaid vendor of goods, even though they are definitely ascertained, is entitled to a lien. We do not claim that the lien ranks in front of any specific charge created by the trust deed, but it does rank over the floating charge over repossessed goods for which Warner's have not been paid. Against this lien the plaintiffs have only set up an estoppel.

The lien exists unless there is shown a manifest intention to exclude it, such, for instance, as by resting content with the personal remedy. Here it was known that Warner's could not be paid for the sets sold to Rawire, Ld., except out of the money advanced by the plaintiffs and other financial houses.

[The following cases, among others, were referred to: *Mackreth* v. *Symmons* (1); *Cood* v. *Cood and Pollard* (2); *Wilson* v. *Kelland* (3); *In re Conolly Bros., Ld.* (*No.* 2). (4)]

G. P. Slade for Rawire, Ld. On the issue whether this is a moneylending transaction I adopt Mr. Evershed's argument, but to the extent that Warner's claim to assert a vendor's lien for unpaid purchase-money, I am opposed to that contention.

The transaction was simply one of lending money on certain security. It was not investing, as the money was only lent for a short term, three to six months. Nor is it the purchase of a bill at a discount. Every note that matured was paid promptly up to a certain date, and the moment there was a default the plaintiffs proceeded to enforce their security. The correspondence refers more than once to "temporary borrowing." The plaintiff company is not engaged in any other business except that of lending money, and therefore is not within the exception of s. 6 (*d*) of the Act of 1900. It is moneylending of a particular class. If

(1) (1808) 15 Ves. 329, 341.
(2) 10 Pr. 109.
(3) [1910] 2 Ch. 306.
(4) [1912] 2 Ch. 25.

the security is invalidated under the Moneylenders Acts, the defendants Warner's cannot by any form of equitable relief recover any of the goods in Rawire's hands.

A mortgagee will not be ordered by the Court to give up a security, except upon payment of the borrowed money: *Lodge* v. *National Union Investment Co., Ld.* (1); *Chapman* v. *Michaelson.* (2)

I do not use these authorities to press the claim to money already collected, but as to repossessed goods and future instalments from hirers, Rawire is entitled as against Warner's, whether the plaintiffs' security is enforceable or not: *Holroyd* v. *Marshall.* (3)

J. F. Bowyer for the defendant Morgan, the receiver.

R. Lionel Edwards for the defendant trustees.

Sir William Jowitt K.C. replied.

SIMONDS J. [after stating the facts as above:] This action was duly begun by writ on August 19, 1938, and so far as I have stated the facts it must appear to be a simple and commonplace action by debenture holders or holders of debenture stock, but the difficulties arise from the defences which have been raised in this action, and they are three.

First, it is said that the trust deed and the trust notes secured thereby cannot operate according to their tenor because there is a vendor's equitable lien for unpaid purchase-money in respect of certain goods of which Rawire obtained possession under the terms of agreements between Rawire and Warner's, and that that vendor's lien for unpaid purchase-money has priority over the charge created by the trust deed. I think that in the course of the argument the assertion of that lien has been limited to those assets which were subject to the floating charge only, and not to the specific charge. That is the first point.

The second point raised is that the whole of the security is unenforceable because the plaintiffs and other noteholders were moneylenders and that this was a moneylending transaction, and that the provisions of the Moneylenders Acts had not been complied with.

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(1) [1907] 1 Ch. 300.

(2) [1909] 1 Ch. 238.

(3) (1862) 10 H. L. C. 191.

Thirdly, it is said—and this is a minor point—that inasmuch as some of the trust notes were issued less than six months before the winding-up of the company, and were not issued for cash, the benefit of the floating charge cannot be claimed in respect of those notes.

In order that I may examine the validity of the claim to a vendor's lien, it is first necessary to look a little more closely at the relation of Warner's and Rawire. It has already appeared from the recitals to the trust deed that the whole of the capital of Rawire is owned by Warner's. It has further appeared in the course of the evidence or by admissions that the control of Rawire is with Warner's. Whether all the members of Warner's board were members of Rawire I do not know, but I think that it is clear that all the members of the board of Rawire were members of Warner's, and it is not disputed that Rawire were wholly controlled by Warner's, and they were, in fact, incorporated in order to serve the particular purpose of Warner's. They were Warner's creature and did their behest, and with regard to the matters with which we are particularly concerned Rawire's relations were defined by the agreement of June 8, 1936, to which reference was made in the collateral agreement of July 14, 1937, which I have already stated.

The agreement of June 8, 1936, which had been in operation for some time before that date, was made between Warner's and Rawire, and it recites as follows—I will read this verbatim because I think it is important to see exactly what the relation was: " Whereas (*a*) Warner's has for some time past carried "on (inter alia) the business of letting wireless sets and other "chattels on hire with an option to purchase the same and of "selling wireless sets or other chattels upon the condition that "the purchase price thereof shall be payable by instalments. "(*b*) Warner's own beneficially the whole of the issued capital "of Rawire and prior to the twelfth day of March One thousand "nine hundred and thirty-six it had been agreed that Rawire "should as from that date carry on the section of the business "previously carried on by Warner's relating to the letting and "selling of wireless sets and other chattels as aforesaid for the "period and upon the conditions hereinafter mentioned."

The operative part of the documents states: "(1.) For a "period of three years from the said twelfth day of March "One thousand nine hundred and thirty-six whenever a "customer makes a request whether verbal or written either "that Warner's shall let to such customer a wireless set or "other chattel on hire with an option to purchase the same "or otherwise or to sell a wireless set or other chattel to the "customer upon condition that the purchase price thereof shall "be payable by instalments Warner's hereby agree to sell "and Rawire hereby agree to purchase such wireless set or "other chattel at the retail price thereof less a discount which "shall be agreed or varied from time to time by writing between "the parties hereto but until so agreed shall be fifteen per cent. "of the said retail price." There is a proviso which I need not read.

Then: "(2.) Immediately after the sale of a chattel to "Rawire as hereinbefore provided Rawire shall enter into an "agreement with the customer either for the letting on hire "of the chattel with an option to purchase the same or for "the sale thereof upon the condition that the purchase price "shall be payable by instalments. (3.) Rawire hereby expressly "waives notice of acceptance by Warner's of Rawire's offer to "purchase such chattels as hereinbefore contained. (4.) Rawire "irrevocably appoints Warner's to be the attorney of Rawire "in its name or otherwise: (*a*) To enter into agreements with "customers as provided by clause 2 hereof and to demand, "receive and give effectual discharges for all or any of the "instalments or other moneys agreed to be paid by hirers or "purchasers under the said agreements. (*b*) To give or receive "all such notices as the said agreements and the acts or "omissions of the parties thereunder may render necessary "Rawire hereby ratifying and confirming and agreeing to "ratify and confirm whatever Warner's may so do as aforesaid. "(5.) In the event of the determination of any said agreements "before payment of the total rent Rawire hereby agrees to "sell and Warner's hereby agree to purchase the chattel the "subject of the said agreement at the price paid therefor by "Rawire and less the amount of the rent or instalments "actually paid by the hirer"—that is the agreement which regulated the relationship between Warner's and Rawire, subject to a variation of the terms as to discount, to which I need not for this purpose refer.

The result of that is quite clear. Rawire were in law a separate entity from Warner's. Rawire entered into a valid agreement for the purchase of articles as they were required for hire-purchase agreements, and as between themselves and Warner's Rawire became in due course the owners of the articles. It appears that as the result of the transactions between them there is a large balance due on general account from Rawire to Warner's. It is in those circumstances and in respect of that general balance that Warner's claim that they have a vendor's equitable lien for unpaid purchase-money which must prevail over the charge created by the trust deed. I emphasize that the claim is not for a possessory lien but for an equitable lien resting on well known equitable doctrine.

It seems to me that on numerous grounds that claim to a lien must fail. In the first place I am not satisfied on the evidence that Warner's have made out the case that in respect of any particular chattel it is not paid for, and it is the essential preliminary to the assertion of a lien that the plaintiff should prove that he has not been paid for that article in respect of which he asserts his lien. It is true that there is a large sum due from Rawire to Warner's on the general balance of account, and when I suggested to learned counsel who argued the case for Warner's that he could only establish his claim with regard to any particular chattel by a somewhat artificial application of the rule in *Clayton's Case* (1) he did not appear to assent to that proposal. But how else he could establish his claim that in respect of any particular chattel he had not been paid I have failed to understand.

(1) (1816) 1 Mer. 572.

SIMONDS J.

1939

Transport and General Credit Corporation v. Morgan.

But, however that may be, there are even greater difficulties in the way of that claim. It is a claim for a vendor's equitable lien in respect of ordinary articles of commerce sold under an ordinary commercial agreement. No case, so far as I know, has ever occurred, and I have not been referred to any authority, in which a vendor's equitable lien has been asserted in the case of an ordinary chattel. It is quite true that there are observations in the books, and in particular in *In re Stucley* (1), which indicate that the doctrine of equity is applicable both to real and to personal property, and of course nothing that I can say reflects or is intended to reflect in the least on that general proposition. It may be that to personal property, at any rate of some kinds and under some conditions, the rule is applicable in the same way as it is to land. But it appears to me that it would be quite inconsistent with what I think is intended to be an exhaustive statement of the law in the Sale of Goods Act, 1893, to say that in the case of an ordinary sale of a commercial article under a commercial agreement there can be any other vendor's lien than that possessory lien which the statute itself provides. So far as I know, no such claim has ever been asserted before this case, and it would be extraordinary if it could now prevail, for, apart from any other considerations, as I pointed out in the course of the argument, it would be very difficult to reconcile the existence of such a lien with the provisions of the bankruptcy law or with the well established principles with regard to the sale of goods.

It may be, as I have said, that in the case of certain personal property, and in particular choses in action, which are not covered by the Sale of Goods Act, 1893, the principle of the vendor's equitable lien for unpaid purchase-money may apply, but I do not propose to hold in this case for the first time that it is a principle which is applicable to the ordinary sale of goods.

Supposing, however, that I am wrong in that and that to a sale of radio sets under an ordinary commercial agreement the equitable principle of vendor's lien is generally applicable, is it applicable in the particular conditions of this case ?

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(1) [1906] 1 Ch. 67.

Here, again, it appears to me that there are fatal objections to the defendants' claim. What has happened in this case has been that Rawire, the owners of the chattel, have, with one hand, with the approbation of and at the instigation of Warner's, and for their benefit, held out this security asking the finance group to lend money on it, representing, so far as conduct can represent, that at any rate so far as Warner's and so far as Rawire were concerned it was a valid security, free from any charge on their part. Having, on the faith of that representation and by that conduct obtained the finance for which they asked, it appears to me to be quite impossible, in accordance with any equitable doctrine which is administered in this Court, that they should then withdraw with their other hand the security which they have offered, and say: "This is a security which is no security, because "it is subject to the prior lien of Warner's."

This is claimed as an equitable lien. What I have stated would appear to suggest that it is a lien founded on no principle of equity whatever. On the contrary, it is a case in which the person asserting the lien blows hot and blows cold, approbates the transaction when he wants the money and reprobates it when, having got the money, he wants the security back. Whether it should be said that the defendants, having a lien, waived it, or that they are estopped from even asserting it, I do not care. It is a claim which in a Court of equity cannot possibly be maintained or enforced. Therefore, for all those reasons, the first defence to this action must fail.

I will deal, secondly, with what I think I stated as being the third defence to these proceedings, a defence which is based on a distinction between the property secured by the floating charge and that secured by the specific charge. It arises in this way: The charge is created by the trust deed of July 14, 1937. The liquidation of Rawire began on May 12, 1938. Six months before that date would be November 12, 1937, and that date is relevant for this reason, that by s. 266 of the Companies Act it is provided: " Where a company "is being wound up, a floating charge on the undertaking or "property of the company created within six months of the "commencement of the winding up shall, unless it is proved "that the company immediately after the creation of the "charge was solvent, be invalid, except to the amount of any "cash paid to the company at the time of or subsequently "to the creation of, and in consideration for, the charge, "together with interest on that amount at the rate of five "per cent. per annum"—the relevance of that is that it is claimed by Rawire that any notes issued by them, in so far as they were issued after November 12, 1937, and in so far as they were not issued for cash, are not valid security.

That defence, in my judgment, must fail in view of the authorities which have been cited. I do not think that it would be consistent with the decision of Sargant J., for instance, in *Esberger & Son* v. *Capital & Counties Bank* (1) to say that the floating charge in this case was created at any other date than that of the execution of the trust deed on July 14, 1937. I am conscious that the result of that may be to provide a gap, in the sense that under the ægis of the trust deed executed at an earlier date debentures or notes might be issued at a later date, which would infringe at any rate the policy of the Act; but I cannot in this Court, in the face of the decisions on similar language in other sections of the Act, treat the floating charge as having been created on any other day than that on which the trust deed was executed.

I may add that, with regard to the plaintiffs—and I have had no evidence about any other noteholders—no distinction could in any case be made, because on the evidence it is clear that the notes held by them and issued to them after November, 1937, were issued for cash, so that in any case they would bring themselves within the exception to the statutory provision. I therefore hold with regard to that defence that the noteholders have a security over the whole of the assets and undertaking of the company, whenever the notes were issued.

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(1) [1913] 2 Ch. 366.

SIMONDS J.

1939

TRANSPORT AND GENERAL CREDIT CORPORATION *v.* MORGAN.

I come finally to the defence—which has been argued perhaps more strenuously than any other point—that this is a moneylending transaction, and that the plaintiffs are moneylenders. It is at this point that it might be difficult to regard the action strictly speaking as a representative action, for it might be, having regard to that plea, that some of the noteholders could enforce their security and others could not. But in the view which I take of the matter and of the transaction which is here under discussion, I do not think that any distinction can be made. The question is twofold: Is this a moneylending transaction? and is it a moneylending transaction by a moneylender?

So far as the plaintiffs are concerned, for reasons which I will presently give, I am satisfied that they are not moneylenders, by which I mean that they do not carry on the business of moneylending, and accordingly, even if this transaction in isolation might somehow be regarded as a moneylending transaction, that does not matter if the plaintiffs themselves are not carrying on the business of moneylenders.

But there is another aspect. Is this such a transaction that, if it was entered into by a person carrying on the business of moneylending, it could be regarded as a moneylending transaction? For it is obvious that a transaction may be entered into by one carrying on the business of a moneylender, which yet is not impeachable as being itself a moneylending transaction.

First of all I should make some reference to the nature of the business carried on by the plaintiff company, and for that purpose I must look at their memorandum of association. The objects for which the plaintiff company were established, according to their memorandum, were, first: "To purchase, "manufacture, or otherwise acquire any goods or commodities "and to let the same on hire and/or to dispose of the same "by hire-purchase or in any other manner." Secondly, their object was to carry on the business of banking in all its branches, with all the ancillary powers which are set out at great length in para. 2 of the objects. Thirdly: "To carry "on and undertake any business, undertaking, transaction or "operation, commonly carried on or undertaken by financiers, "discount houses, capitalists, underwriters of companies, "stock, shares or debentures" and so on. There are a great number of other objects, including the object of lending money with or without security, and to subsidize, assist and guarantee the payment of money by, or the performance of any contract, engagement or obligation by, any persons or companies, and in particular customers of the company or any persons or companies with whom the company may have or intend to have business relations.

It is quite clear that, although the lending of money is one of the manifold objects of the company, it could not be said that the company were incorporated for the purpose of carrying on the business of a moneylender. I turn, then, to see what the company have in fact done, and find that for the first two or three years of their existence they did nothing except to purchase and to let out on hire-purchase agreements certain motor-lorries. The last transaction of that kind was entered into in 1934, and from 1934 onwards the hire-purchase agreements which had been entered into were being worked out. Apart from that and some trivial business of bill discounting the company did nothing until they entered into the transaction which is here under discussion, a transaction which in my view was nothing more than the carrying out of an agreement by a number of finance houses, in conjunction with a dealer in a large way in a particular kind of article, to finance and develop a particular business. So far as the plaintiffs themselves are concerned, this was the solitary transaction. There was no system or continuity, and there is nothing from which I can infer that they are going to enter into transactions of this kind in future rather than do one or all of the many other things which their memorandum authorizes them to do. They have in this single transaction financed a particular industry. There is in my judgment nothing to justify the conclusion that they are carrying on the business of moneylenders. So far, then, as the plaintiffs are concerned the action must succeed. With regard to the other noteholders on whose behalf the plaintiffs purport to sue the matter appears to stand thus: It may well be that each one of them is in exactly the same position as the plaintiffs, that is, is not carrying on the business of a moneylender and is therefore in any view of the transaction not debarred by the Moneylenders Acts from maintaining this action. But the question has been debated, and it is right that I should express my view on it, whether this is a moneylending transaction, even if entered into by one who is carrying on the business of a moneylender.

The nature of the transaction, as I have already indicated, is this: The finance group severally entered into an agreement with Warner's and Rawire by which they undertook to finance, as from time to time was required, the business of acquiring radio sets and other articles and letting them out on hire-purchase agreement or selling them on credit. That was their obligation, and from time to time, to carry it out, they had to take up notes as their turn came.

It has often been said that it is in any case a question of fact whether a transaction is one of moneylending. It appears to me that it would be contrary to the ordinary use of language to describe this as a moneylending transaction, or to regard the financier (if I may so call him) who undertakes this business as carrying on the business of moneylending.

It must be remembered that hire-purchase agreements now take a very large part in the commercial and social life of the community, and the financing of them is an enormous business in the City of London and elsewhere. It appears to me that the financiers and the dealers co-operate in the common venture of making the whole business of hire-purchase agreements, which is now, for good or for evil, a necessary part of our social life, feasible, and to regard one party to that common venture, which is now a recognized mercantile service, as carrying on the business of a moneylender is an abuse of language.

I was invited to look, but I declined to do so, at the report of the Royal Commission as a result of which the Moneylenders Act was passed. But without looking at the report of the Royal Commission I am, I think, entitled to consider broadly what was the state of the law when the Moneylenders Act was passed, and what was the abuse which that Act was intended to remedy. It appears to me that on a consideration of those facts it is quite impossible to construe the words of the Legislature, "moneylending," "the business of moneylending," and "moneylending transactions," as covering a transaction of this kind, which, as I have said, has become a part of a normal mercantile transaction and an essential part of the industry in a recognized commercial sense.

For those reasons, therefore, apart altogether from the position of the plaintiffs, who do not carry on the business of moneylenders, I do not consider that this is a moneylending transaction within the meaning of the statutes and, accordingly, that defence also fails.

That defence failing, it appears to me that the plaintiffs are entitled to relief which I think is in common form. There must be an account of the money due taken in Chambers, and in due course there must be payment of the amount due.

Solicitors: *Maxwell, Batley & Co.*; *Kenneth Brown, Baker, Baker.*

H. L. L.

NATIONAL ELECTRIC THEATRES, LIMITED *v.* HUDGELL.

MORTON J.

1939

Feb. 10, 13, 14.

[1938. N. 987.]

Landlord and Tenant—Demolition and rebuilding—"Improvement"—"Reasonable and suitable to character" of holding—Landlord and Tenant Act, 1927 (17 *&* 18 *Geo.* 5, *c.* 36), *s.* 3, *sub-s.* 1.

At the date of this action the plaintiffs were the assignees of two leases, executed respectively in 1911 and 1918, demising for ninety-nine years from June 24, 1910, certain land with a cinema thereon. The defendant, at the date of the action, was the freeholder. In both leases were covenants not without the lessor's written consent to use the holding or permit its use except as a hall licensed for entertainments and meetings, such consent not to be unreasonably withheld, and in the lease of 1918 there was also a lessee's covenant not to erect or permit the erection of anything on or near the south-west corner of the land so as to prevent access to the windows of the lessor's shop and premises adjoining the land on its south side, or to interfere with the access and use of light and air to and for such windows. Until March 31, 1938, the building had always been used as a cinema. The licence for its use was not then renewed, and the plaintiffs were told that they would not be given a licence to use for public entertainment any building on the land not conforming to certain requirements. In 1937 the plaintiffs had submitted to the defendant a plan and specification for shops with flats above, to be built on the land after demolishing the cinema. They now wished to proceed with the demolition and building. They had not served on the defendant, in accordance with s. 3, sub-s. 1, of the Landlord and Tenant Act, 1927 (1), notice of intention to make the improvement.

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(1) Sect. 3, sub-s. 1: "Where a "tenant of a holding to which this "Part of this Act applies proposes "to make an improvement on his "holding, he shall serve on his "landlord notice of his intention "to make such improvement, "together with a specification and "plan showing the proposed im-"provement and the part of the "existing premises affected there-"by, and if the landlord, within "three months after the service "of the notice, serves on the "tenant notice of objection, the "tenant may, in the prescribed "manner, apply to the tribunal, "and the tribunal may, ... "if satisfied that the improve-"ment—(*a*) is of such a nature as "to be calculated to add to the "letting value of the holding at "the termination of the tenancy; "and (*b*) is reasonable and suit-"able to the character thereof; "and (*c*) will not diminish the "value of any other property "belonging to the same landlord, "or to any superior landlord "from whom the immediate land-"lord of the tenant directly or "indirectly holds; . . . . certify

MORTON
J.

1939

NATIONAL
ELECTRIC
THEATRES,
LD.
v.
HUDGELL.

Sect. 21, sub-s. 1, provides that the tribunal to whom application is to be made under s. 3, sub-s. 1, shall be the county court, unless all persons affected agree that the claim or application should be heard by the High Court, or the matter is transferred to the High Court under the County Courts Act, 1888, s. 126. By Order LIII.D of the Rules of the Supreme Court the proceedings are assigned to the King's Bench Division.

The defendant admitted that the proposed works would enable the holding to be used profitably and increase its value for letting purposes and otherwise, but contended that works involving the entire demolition of all the buildings could not be an " improvement " within the meaning of the Act.

The plaintiffs claimed a declaration that the proposed works would constitute an improvement within the meaning of s. 3 of the Act, a declaration that they would constitute an improvement reasonable and suitable to the character of the holding within s. 3, sub-s. 1, and a declaration specifying, on the construction of the lease of 1918, the windows protected by the covenant in that lease :—

Held : (1.) that the proposed works would be an improvement on the holding in any ordinary use of the word " improvement," and would constitute an " improvement " within the meaning of s. 3 ;

(2.) that s. 3, sub-s. 1, did not refer only to alterations of buildings, for, if it did, the erection of a new building on unoccupied land could not be an improvement, and it was clearly intended that it might be an improvement ;

(3.) that the provision in the sub-section that there should be served on the landlord notice of the intention to make the improvement " together with a specification and plan showing " the proposed improvement and the part of the existing premises " affected thereby " was not inconsistent with the view that improvement could include demolition and rebuilding ;

(4.) that the provisions of the Act did not necessitate that a rebuilding of business premises after demolition should, in order to constitute an " improvement," be a rebuilding for the purpose of the same business ;

(5.) that the question whether the proposed demolition and rebuilding would constitute an improvement " suitable to the " character of the holding " within the meaning of s. 3, sub-s. 1, was hypothetical, since the tenant had not served on the landlord

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"in the prescribed manner that "the improvement is a proper "improvement : . . . ."

Sub-s. 2 : " In considering "whether the improvement is "reasonable and suitable to the "character of the holding, the "tribunal shall have regard to any "evidence brought before it by "the landlord or any superior "landlord (but not any other "person) that the improvement is "calculated to injure the amenity "or convenience of the neighbour-"hood."

notice of intention to make the improvement, and, since it would therefore have to be assumed that the landlord had objected to the improvement, and that the Court was the proper tribunal, which in fact it was not: the Court would not answer the question.

F. W. Woolworth & Co., Ld. v. *Lambert* [1937] Ch. 37 and *Lambert* v. *F. W. Woolworth & Co., Ld.* [1938] Ch. 883, considered and distinguished.

WITNESS ACTION.

National Electric Theatres, Ld. (hereinafter called "the plaintiffs"), were the assignees of two leases, executed respectively on May 12, 1911, and December 5, 1918, demising for ninety-nine years from June 24, 1910, land and buildings known at the date of this action as "The Grand Hall," Finchley, "The Grand Hall" being a cinema. Mrs. Fanny Hudgell (hereinafter called "the defendant") owned the fee simple reversion. In each lease were lessee's covenants not without the lessors' written consent to use the holding or permit its use except as a hall licensed for entertainments and meetings, such consent not to be unreasonably withheld. In the lease of 1918 was also a lessee's covenant not to erect or permit to be erected anything on or near the south-west corner of the land thereby demised in such a way as to prevent any person or persons having access to the windows of the shop and premises belonging to the lessors adjoining the demised land on the south side thereof or so as to interfere with the access and use of light and air to and for such windows. The shop and premises referred to in this covenant were No. 14 Market Parade. The plaintiffs wished to demolish the cinema and build shops and flats in accordance with a plan and specification submitted to the defendant in 1937.

It was admitted that the premises were at all material times to March 31, 1938, licensed and used as a cinema, and that a renewal of the licence was refused, with an intimation that any building on the holding not leaving a substantial part of the holding vacant as passages, on to which exits from the building would open, would not be licensed for any form of public entertainment.

The plaintiffs asked for three declarations: first, that their proposed demolition of The Grand Hall and building on the land in its place of shops and flats over them, would constitute an improvement within the meaning of s. 3 of the Landlord and Tenant Act, 1927; secondly, that it would constitute an improvement "reasonable and suitable to the character of "the holding" within the meaning of s. 3, sub-s. 1; and thirdly, a declaration, on the construction of the lease of 1918, specifying the windows protected by the covenant therein.

The defendant admitted that the works proposed to be carried out would enable the holding to be used profitably, and would forthwith greatly increase the value of the holding for letting purposes and otherwise, and that they were calculated to add to the letting value of the holding at the termination of the term; but she contended that anything involving the entire demolition of all the buildings on the site could not be an "improvement" within the meaning of the Act.

Cyril J. Radcliffe K.C. and *G. A. Rink* for the plaintiffs. It is perfectly true that the only person who can make an effective order under s. 3 is the appropriate tribunal, which this Court is not; and no order can be made without considering the suitability of the proposed works. In the present case, the parties have agreed not to ask for a certificate so that there will never be an application to the county court. Therefore there is no question here of any conflict of jurisdiction. Having regard to the agreement between the parties it is a question of "now or never." Thus, the question of what is "reasonable and suitable" for the purposes of s. 3 must be one, not merely of law, but of law having regard to the proved facts. As between the parties the meaning of the phrase "reasonable and suitable" in s. 3 is not the meaning which a tribunal sitting to operate under that section would give to it. Its meaning is the true meaning of the words, in that section, having regard to the holdings. It is not denied that the declaration asked for with regard to reasonableness and suitability refers to a question of disputed fact, in the sense that the Court would have to hear evidence as to the existing circumstances and intended improvements and make up its mind whether they are reasonable. There is nothing hypothetical about the facts. When those facts and the consequences with regard to the legal rights of other persons have been ascertained, the question is one which a Court of law can decide. Possible interference with the rights of third parties is wholly irrelevant.

D. Ll. Jenkins K.C. and *Maurice Berkeley* for the defendant. The proposed works are not within s. 3. An improvement is the result of a process which, when applied to a given subject-matter, makes it better than it was before. The two essential features of improvement are (*a*) betterment and (*b*) the continued existence of the thing improved. It follows that, when a given course of action is alleged to be an improvement, the true test is to find, first, the relevant subject-matter, and then what it is alleged to be an improvement of. Here the process which the plaintiffs allege to be an improvement is not an improvement within the meaning of the Act, because it totally destroys the subject-matter which is to be improved.

Part I. of the Landlord and Tenant Act, 1927, is directed to the payment of compensation. That is its primary object. It is true that it contains among its provisions s. 3, sub-s. 4, but that comes in rather as a corollary to the right of compensation. It is legislation of a very peculiar type. It might be termed an inverted kind of compulsory purchase. Any improvement, which is an improvement within the meaning of the Act, is one for which the landlord must pay compensation at the end of the term. That being the type of legislation, and its object being to entitle the tenant to compensation, it is alarming to find the wide scope which the plaintiffs seek to attach to it: it indicates that there is no limit to the improvements which a tenant can force on a landlord. The proper way of applying the definition of "holdings" in the Act (which is in s. 17, sub-s. 1) to s. 3 is to be specific. Premises must be improved in their character as premises for the trade or business in which they have already been used: see s. 17, sub-s. 4. (1) For example, a shopkeeper must not improve his premises into a hotel. *Lambert* v. *F. W. Woolworth & Co., Ld.* (1), per Slesser L.J. It is significant that sub-s. 2 of s. 19 of the Act (a section containing provisions as to covenants not to assign, underlet, charge, or part with possession without licence or consent) applies to all leases, whether made before or after the commencement of the Act. [They referred to *F. W. Woolworth & Co., Ld.* v. *Lambert.* (2)]

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(1) Sect. 17, sub-s. 4: "In the "case of premises used partly for "purposes of a trade or business "and partly for other purposes,

Cyril J. Radcliffe K.C. in reply. The observations of Slesser L.J. in *Lambert* v. *F. W. Woolworth & Co., Ld.* (1) do not give any help with regard to Part I. of the Act. What he is dealing with is the construction of particular terms in actual documents.

MORTON J. [after stating the facts and dealing first with a question of construction :] I now turn to the first and second declarations, and in dealing with the first one I propose to read certain admitted paragraphs of the statement of claim. It is admitted that the plaintiffs are the assigns of the leases to which I have referred and that the defendant is the present owner of the fee simple subject to, and expectant upon, the terms granted by the leases. Para. 3 of the statement of claim is: "The holding"—that is the premises demised by the two leases—" was at all material times down to March 31, 1938, "duly licensed as a cinematograph theatre, and was used "accordingly. On that date the music and cinematograph "licences in respect of the holding expired, and the Middlesex "County Council has refused to renew the same and has "intimated that it would not hereafter license the present "buildings on the holding for any form of public entertainment. Further, the Middlesex County Council would refuse "to license, for any form of public entertainment, any "building on the holding which did not leave a very substantial part of the holding vacant as passages on to which "exits from such building would open." Pausing there, this paragraph, which is admitted in the defence, shows that the

"this Part of this Act shall apply "to improvements only if and so "far as they are improvements in "relation to the trade or business."

(1) [1938] Ch. 883, 901.

(2) [1937] Ch. 37.

MORTON J.

1939

NATIONAL ELECTRIC THEATRES, LD. v. HUDGELL

building cannot be used as a cinematograph theatre, or for any form of public entertainment whatsoever, unless and until it is rebuilt or so altered that satisfactory exits can be provided. I do not think it is unfair to describe the present building as a derelict building, as it stands. Para. 5 (which is also admitted by the defence) is: " In the circum-"stances, the plaintiffs are desirous of carrying out the "following works (hereinafter called ' the proposed works ') "on the holding (namely) the demolition of the existing "buildings on the holding and the erection of new buildings "containing lock-up shops with residential flats over them, "in accordance with a plan and specification which were "submitted to the defendant on or about October 23 and "November 1, 1937." The date originally appearing in the pleadings was March 1, 1938, but in fact the works to which my attention is directed are works in accordance with a plan and specification submitted in 1937, the plan being submitted on October 23 and the specification on November 1. Para. 5 continues: " The said new buildings will (according "to the said plan and specification) be of the same general "type as those in the neighbourhood of the holding, and be "in all respects of at least equal quality with such neigh-"bouring buildings. The proposed works would enable the "holding to be used profitably, and would forthwith greatly "increase the value of the holding for letting purposes and "otherwise. Further, the proposed works are of such a nature "as to be calculated to add to the letting value of the holding "at the termination of the said term. The defendant does "not own any other property in the neighbourhood which "could be affected by the proposed works." The plaintiffs' holding under the two leases is a piece of land having a total frontage of 120 feet on the Great North Road and a depth of 125 feet, with a cinematograph theatre on it which cannot now be used for any form of public entertainment. If the proposed works are carried out, the holding will consist of the same piece of land, having on it a row of new shops with residential flats over them, and it is admitted that the works to be carried out would enable the holding to be used profitably, and would forthwith greatly increase the value of the holding for letting purposes and otherwise. It is also admitted that the works are calculated to add to the letting value of the holding at the termination of the term. So far, the change, to use for the moment a neutral word, is clearly for the benefit of the tenant, and it seems equally clear that the landlord's rent would be more amply secured throughout the term. It seems to me that these works would be an improvement on the holding in any ordinary use of the word "improvement." When the works have been carried out, the plaintiffs can say: "We have pulled down the cinematograph theatre which was no longer of any use. We "have substituted for that a row of shops with residential "flats over them. The result is that the letting value of the "holding has been greatly increased, both immediately and "at the end of the term." It would surely be a natural use of words if the plaintiffs went on to say: "We have carried "out an improvement on our holding." To take another example, suppose that the holding consisted of a piece of land having on it a row of extremely badly built and insanitary shops and the lessees of that holding pulled down those shops and erected a row of modern well-built shops with every sanitary convenience, that would surely, in the ordinary use of the word "improvement," be an improvement carried out on the holding.

However, it is argued that the demolition of The Grand Hall and the building of a row of shops with flats over them cannot be an improvement within the meaning of s. 3, and I must turn to the Act to see whether this argument is well founded. Part I. is headed: "Compensation for improve-"ments and goodwill on the termination of tenancies of "business premises." Sect. 1, sub-s. 1, is: "Subject to the "provisions of this Part of this Act, a tenant of a holding to "which this Part of this Act applies shall, if a claim for the "purpose is made in the prescribed manner"—then the time within which the claim is to be made is stated—"be "entitled, at the termination of the tenancy, on quitting his "holding, to be paid by his landlord compensation in respect "of any improvement (including the erection of any building) "on his holding made by him or his predecessors in title, not "being a trade or other fixture which the tenant is by law "entitled to remove, which at the termination of the tenancy "adds to the letting value of the holding." Pausing there, I think the words " including the erection of any building " are of some importance, though they are far from being conclusive. It is possible to read these words as being limited to the erection of a building on some part of the holding which is vacant, but it is possible to read them as applying also to the erection of a building in place of a building which previously stood on the holding. I shall have to turn shortly to the provisions of s. 17 in order to see what is " a holding to which "this Part of this Act applies," but I shall continue sub-s. 1 for the moment. It proceeds : " Provided that the sum to "be paid as compensation for any improvement shall not "exceed—(*a*) the net addition to the value of the holding as "a whole which may be determined to be the direct result of "the improvement ; . . . . " With regard to these words, it would appear that the Act is dealing with *net* additions to the value and is contemplating that the works to be carried out might in some respects be detrimental and in other respects beneficial to the holding. The section continues : "or (*b*) the reasonable cost of carrying out the improvement "at the termination of the tenancy, subject to a deduction of "an amount equal to the cost (if any) of putting the works "constituting the improvement into a reasonable state of "repair, except so far as such cost is covered by the liability "of the tenant under any covenant or agreement as to the "repair of the premises." I have read and carefully considered sub-ss. 2 and 3, but I do not think that they throw any light on the question which I have to determine, and I think that before passing to s. 2 I should turn to s. 17 in order to see with what this part of the Act is dealing.

Sect. 17, sub-s. 1, is : " The holdings to which this Part "of this Act applies are any premises held under a lease, other "than a mining lease, made whether before or after the "commencement of this Act, and used wholly or partly for "carrying on thereat any trade or business, and not being "agricultural holdings within the meaning of the Agricultural "Holdings Act, 1923." It is not disputed that the holding with which I am concerned is a holding to which Part I. of the Act applies. The holding is one used wholly for business purposes.

I may add that, if the proposed works are carried out, the holding will still be one to which Part I. of the Act applies, as it will still be used partly for business purposes. I now turn back to s. 2, and I need not read sub-s. 1, which sets out certain circumstances in which a tenant is not entitled to compensation. Sub-s. 2 is: "Where an offer of the "renewal of a tenancy by the landlord under this section is "accepted by the tenant, the rent fixed by the tribunal shall "be the rent which in the opinion of the tribunal a willing "lessee other than the tenant would agree to give and a "willing lessor would agree to accept for the premises, having "regard to the terms of the lease, but irrespective of the value "attributable to the improvement in respect of which "compensation would have been payable." I can quite see that a tribunal endeavouring to apply that sub-section might in the present case, indeed in many cases, have a very difficult task to perform; but I cannot find that the sub-section leads me to the conclusion at which counsel for the defendant would have me arrive. I do not think there is contained in that sub-section any indication that an improvement cannot consist of a demolition or rebuilding, or any indication that, if business premises can be demolished and rebuilt, they must be used for the purposes of the same business, which is another of the contentions of counsel for the defendant.

I now turn to s. 3, which is the section I have to construe. Sub-s. 1 is: [His Lordship read it, and continued:] The plaintiffs in this case have not thought fit to go through that procedure with regard to the improvements which they were contemplating in 1937; they have come to the Chancery Division asking for the declarations which I have mentioned. The questions which arise in regard to the first declaration are, I think, questions of construction, and the parties are entitled to come to this Court and to obtain a decision whether the proposed works are an improvement within the meaning of the section.

The first comment which I have to make on this sub-section is that what is being dealt with is an improvement *on* the holding, that is to say, work which it is desired to carry out on the holding. I do not think that the sub-section can refer only to alterations of buildings, otherwise the erection of a new building on an unoccupied piece of land could not be an improvement; and I think it is clearly contemplated by Part I. of the Act that the erection of a new building on an unoccupied part of the land may be an improvement. Mr. Jenkins for the defendant relies strongly upon the words " and plan showing the proposed improvement and "the part of the existing premises affected thereby." He says these words show that the improvement contemplated cannot extend to the demolition of all the buildings on the land demised. I cannot accede to this argument. It involves construing the words " existing premises " as meaning, and meaning only, " existing buildings," and I do not think it would be right to give this limited meaning to the words. It is true that I can see no good reason why the phrase " the part of the existing premises " is used instead of the phrase "the part of the holding," but I do not think that this Act draws any clear distinction between the word " holding " and the word " premises."

Sub-s. 2 is: " In considering whether the improvement is "reasonable and suitable to the character of the holding, the "tribunal shall have regard to any evidence brought before "it by the landlord or any superior landlord (but not any "other person) that the improvement is calculated to injure "the amenity or convenience of the neighbourhood." Mr. Radcliffe for the plaintiffs relies on this sub-section as showing that changes of a substantial character are included within the word " improvement." By sub-s. 4: " Where no such "notice of objection as aforesaid to a proposed improvement "has been served within the time allowed by this section, or "where the tribunal has certified an improvement to be a "proper improvement, it shall be lawful for the tenant as "against the immediate and any superior landlord to execute "the improvement according to the plan and specification "served on the landlord, or according to such plan and "specification as modified by the tribunal or by agreement "between the tenant and the landlord or landlords affected, "anything in any lease of the premises to the contrary not-"withstanding: . . . ." The effect of that is that, in appropriate circumstances, any provisions in the lease prohibiting the improvement are swept away.

I now turn to s. 21 in order to see what is the tribunal which is referred to in s. 3. Sect. 21, sub-s. 1, is: "The tribunal for "the purposes of Part I. of this Act shall be the county court "within the district of which the premises or any part thereof "are situated acting under and in accordance with this "section: Provided that—(*a*) if before commencing proceed-"ings in the county court the claimant or applicant and all "persons affected agree that the claim or application should "be heard by the High Court; or (*b*) if on an application "being made to the High Court within the prescribed time the "matter is transferred to the High Court in accordance with "and subject to the provisions of section one hundred and "twenty-six of the County Courts Act, 1888; the High Court "shall, in respect of the matter, be the tribunal for the purposes "of Part I. of this Act." Then follow certain provisions with regard to the matter being referred for inquiry and report to a referee. By sub-s. 7: "Rules of the Supreme Court may be "made regulating proceedings under this Act commenced in "or transferred to the High Court, and those rules may provide "that on the hearing of a summons for directions, the court "or a judge thereof may, without any application for the "purpose being made by any party, order the matter to be "referred for inquiry and report to such one of the said panel "of referees" (a panel of referees appointable by a Reference Committee constituted by s. 21, sub-s. 6) "as may be "selected by the court or a judge thereof, subject to such "directions (if any) as the court or judge may think fit to give; ". . . ." The Rules in question are contained in Order LIII.D, and provide that the matters transferred to the High Court under this section are to be heard by the King's Bench Division, in a manner which I need not describe in detail.

I now turn to s. 17, sub-s. 4, which has been strongly relied on by Mr. Jenkins. It is: [His Lordship read it and continued:] That sub-section does not apply to the premises in question in the present case because they are used wholly for business purposes, but Mr. Jenkins relies upon the sub-section, and especially upon the words "the trade or business," as indicating that the Act has in mind alterations of premises which will result in the same business being carried on thereon. This sub-section does not lead me to any such conclusion. I think the sub-section is merely drawing a distinction between improvements in relation to the trade or business for which a part of the premises is used and improvements of the part of the premises which is used for other purposes, and is applying Part I. only to the former class of improvements. I do not think it throws any real light on the problem which I have to consider.

Reading the Act as a whole, I see no reason for reading into the words "an improvement on his holding," in s. 3, any condition that some part of the original bricks and mortar of the buildings upon the holding must be retained. Such a construction of the section gives rise to grave difficulties. For example, assume that a tenant of a grain-store first of all removes a defective wall and replaces it with a new wall, then treats each of the other three walls, which in turn become defective, in the same way, then replaces the roof which has become defective, then takes up the existing floor and replaces it by a new one. Each of these acts must, I think, be an improvement, yet in the end the building which was there has been replaced by something quite new. It appears to me that, in their ordinary meaning, the words "an improvement on his holding" would cover what is intended in the present case, and I cannot find anything in the Act which limits the meaning of these words in the manner suggested by Mr. Jenkins. Mr. Jenkins further contends that, if a demolition, and rebuilding can be an improvement,

MORTON J.

1939

NATIONAL ELECTRIC THEATRES, LD. *v.* HUDGELL.

the rebuilt premises must be premises on which is carried on the same business as that which was carried on in the demolished premises. That would be a most important limitation on the power to make improvements, and, if it had been intended by the Legislature, I think it would have been set out in the Act in plain terms. I do not find anything in the sections to which I have referred, or in the other portions of the Act, to lead me to the conclusion that such a limitation exists.

Mr. Jenkins points out that the construction of the Act for which the plaintiffs contend may lead to grave hardship. For instance, an investor might invest a modest sum in buying the freehold of a small property, subject to a lease, and the lessee might pull down this small property and erect an expensive block of shops with flats over them, and thereby impose upon the landlord, against his will, the obligation to pay a very substantial sum by way of compensation at the end of the lease. That may be the result of the Act, in certain cases, but I have simply to interpret the Act as it stands. Further, there is a safeguard inserted in s. 3 itself, because the improvement cannot be carried out under the section unless the tribunal is satisfied that it is reasonable and suitable to the character of the holding. I do not propose to express any view upon the construction of the word "reasonable" or upon the construction of the words "suitable to the character of the holding" for reasons which I shall shortly state, but the landlord has this safeguard, which is of some importance.

For the reasons which I have given I propose to declare that the proposed works will constitute an improvement within the meaning of s. 3 of the Landlord and Tenant Act, 1927. I should add, before I pass to the second declaration which I am asked to make, that counsel have not been able to refer me to any decision on the point which I have just determined. I have been referred to certain observations of the Court of Appeal in *F. W. Woolworth & Co., Ld.* v. *Lambert* (1) and in *Lambert* v. *F. W. Woolworth & Co., Ld.* (2), but the Court of Appeal was dealing in each of these cases with a very different subject-matter—namely, the construction of s. 19, sub-s. 2, of the Act. That is a section by which a proviso is deemed to be inserted in leases containing a certain type of covenant. I cannot find that the decisions on that part of the Act are of any real assistance to me in the task which I have to perform.

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(1) [1937] Ch. 37.

(2) [1938] Ch. 883.

I now come to the second declaration which is claimed. The plaintiffs ask me to declare that the proposed works will constitute an improvement which is reasonable and suitable to the character of the holding, within the meaning of s. 3, sub-s. 1, of the Act. In the course of Mr. Radcliffe's opening I expressed doubts whether I could properly determine the questions raised by this claim, and those doubts increased in the course of the evidence which was called on the first day of the hearing. This claim seemed to me to involve the determination of questions which I have no jurisdiction to determine. The plaintiffs allege in para. 4 of the statement of claim that: "The said present buildings on the holding "cannot be used for any purpose which would produce a "reasonable income after the payment of rent and all other "outgoings. Alternatively, if the said buildings can be used "for any income-producing purpose, the net income which "would (after paying all outgoings) result from such use "would be very much smaller than the net income which "could be obtained (after paying all outgoings, and paying "or making a reasonable allowance for interest on the "expenditure to be incurred) if the said buildings were "demolished and the buildings hereinafter referred to were "erected in their place. The holding is so small that if any "new building were erected on the space remaining after "leaving vacant such passages as are referred to in para. 3 "hereof, such building would not be big enough to enable it "to be used, at a reasonable profit, for entertainments or "meetings." By para. 2 of the defence the defendant denies each and every one of these allegations, so that before I could determine the issue raised by this second claim I should have to arrive at a conclusion on these disputed questions of fact, and I should then have to consider whether, in the light of the facts found by me, the improvement was reasonable and suitable to the character of the holding, and presumably I should have to take into consideration the matters mentioned in s. 3, sub-s. 2. That is a task which has been assigned by the Legislature to certain defined tribunals, of which the Chancery Division of the High Court of Justice is not one. If I embarked on the task of deciding these issues, I should really be deciding a hypothetical question. I should have to assume, first of all, that notice had been served by the tenant on the landlord of his intention to make this improvement. That has not been done in the case of the improvement which I am considering. Then I should have to assume that the landlord had objected to this improvement ; then I should have to assume that I am the tribunal empowered by the Legislature to decide this question, and that is not the fact. The Court has always set its face against deciding hypothetical questions, and I decline to decide this question. I realize that in endeavouring to bring the matter before the Court in this way the parties were trying to save delay and expense, and I should have been glad if I could have seen my way to assist them by deciding this point, but I think it would be wrong to do so. The position is quite different with regard to the first declaration claimed. With regard to that claim, I am asked to decide, on agreed facts, whether certain works are an improvement within the meaning of s. 3. That is a question of construction, and in my view a tenant can properly ask this Court to decide that question before he decides whether he will or will not take the steps which are described in s. 3.

With regard to the second declaration, the facts are not agreed, and even if they were I do not think I ought to treat myself, on the series of assumptions I have mentioned, as being in the place of the tribunal selected by the Act to determine the issues which arise. For these reasons I do not propose to make that declaration.

Solicitors : *W. G. R. Saunders ; Merton Jones, Lewsey & Jefferies.*

K. R. A. H.

NOBLE LOWNDES AND PARTNERS (A FIRM) *v.* HADFIELDS, LIMITED.

SAME *v.* SAME.

FARWELL
J.

1938
Nov. 15.

Practice—Parties—Adding or substituting plaintiff—Action commenced in firm name—Bona fide mistake—R. S. C., Order XVI., *r.* 2; *Order* XLVIIIA., *r.* 1. (1)

A contract was entered into by N. F. L. on behalf, as he thought, of a firm, N. L. and Partners. An action for breach of the contract was brought in the name of N. L. and Partners against the defendants. On discovery it was found that there was no firm of that name. N. F. L. sought to amend the statement of claim by substituting his name only as plaintiff and the defendants sought to strike out the statement of claim:—

Held, that there was a bona fide mistake, and that, where two or more persons claiming to be partners sue or are sued in a firm name under Order XLVIIIA., the action remains an action by or against the individual members of the firm, and the application therefore amounted to an application to strike out the names of all the plaintiffs except one, and should be allowed.

PROCEDURE SUMMONS.

Mr. N. F. Lowndes entered into a contract with the defendants in the name of Noble Lowndes and Partners. Mr. Lowndes thought that there was a partnership between himself and five other persons, and an action was brought on the contract, the plaintiffs being named as Noble Lowndes and Partners (a firm). The defendants discovered that there was no such firm. Mr. Lowndes took out a summons to amend by substituting his name for the name of the firm, and the defendants took out a summons to strike out the statement of claim.

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(1) Rules of Supreme Court, Order XVI., r. 2: "Where an "action has been commenced in "the name of the wrong person as "plaintiff, or where it is doubtful "whether it has been commenced "in the name of the right plaintiff, "the court or judge may, if satisfied that it has been so commenced through a bona fide "mistake, and that it is necessary "for the determination of the real "matter in dispute so to do, order "any other person to be substituted or added as plaintiff upon "such terms as may be just."

Order XLVIIIA., r. 1: "Any two "or more persons claiming or "being liable as co-partners and "carrying on business within the "jurisdiction may sue or be sued "in the name of the respective "firms, if any, of which such "persons were co-partners at the "time of the accruing of the cause "of action; and any party to an "action may in such case apply "by summons to a judge for a "statement of the names and "addresses of the persons who "were, at the time of the accruing "of the cause of action, co-"partners in any such firm, to be "furnished in such manner, and "verified on oath or otherwise as "the judge may direct."

G. P. Slade for the applicant, Mr. Lowndes. The action was commenced in the name of the wrong plaintiffs and the application is for the proper plaintiff be substituted. It is not a case of a new plaintiff, as in *Tetlow* v. *Orela, Ld.* (1) The contract sued upon is the same. [He referred to *The Assunta.* (2)]

Roger Turnbull for the defendant company. The application is based on Order XVI., r. 2. The firm was non-existent, and therefore what is sought to be done is creating a new plaintiff, which cannot be done: see Russell J. in *Tetlow* v. *Orela, Ld.* (1) The applicant does not come within the Order at all. Also there must be a bona fide mistake, as in *Hughes* v. *The Pump House Hotel Co., Ld.* (*No.* 2). (3)

FARWELL J. There are two summonses before the Court, one by the plaintiff in the action, who seeks to amend by substituting the name of an individual for the name of a firm and to re-deliver the writ and statement of claim so amended; and the other by the defendants, who seek to have the statement of claim struck out. The action was brought in the name of a firm, Noble Lowndes and Partners, and the statement of claim alleges that the plaintiff firm carries on a business as consultants in life insurance matters, and that it proposed a scheme of insurance to the defendant company which it suggested they should adopt on the terms that the defendant company should make no payment to the firm and should select any of the insurance companies suggested, but that the actual business should be carried out by the plaintiffs who would receive as their remuneration the commission from the insurance company, and that these terms were agreed to by the defendant company who adopted the scheme.

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(1) [1920] 2 Ch. 24.

(2) [1902] P. 150.

(3) [1902] 2 K. B. 485.

The plaintiffs complain that the defendant company dealt direct with the insurance company and thus deprived them of the commission. The defence is that there was no contract. In the course of the proceedings the defendants discovered that there was no firm registered under the name of "Noble Lowndes and Partners (a firm)," and thereupon they objected that the plaintiff firm was not entitled to sue at all. It appears that there was an arrangement between Mr. Lowndes and five other persons interested in the business, but that that arrangement did not create a partnership. At the time when the action was commenced Mr. Lowndes honestly thought that he was entitled to sue in the firm name. Having now ascertained the true position, he seeks by this summons to be substituted as sole plaintiff. The contract which Mr. Lowndes seeks to enforce is in the same terms as that originally pleaded, and the only amendment necessary is the substitution throughout of his name in the place of the name of a firm which does not exist. The question is whether such an amendment can be permitted under the rules. Until Order XLVIIIA., r. 1, came into force each individual forming a partnership had to sue or be sued in his own name, but under this rule that is no longer necessary, and a partnership can now sue or be sued in the firm name. [His Lordship read the rule.] I now turn to Order XVI., r. 2. Before any such amendment as the applicant seeks here can be allowed the Court has to be satisfied that there has been a bona fide mistake. From the evidence before me I am satisfied that there has been a bona fide mistake, and on that ground the application ought not to be dismissed. But that is not the end of the matter. I have been referred to a case of *Tetlow v. Orela, Ld.* (1), and it is said by the respondents to the summons that on the principle of that decision I ought to refuse this application. That was an action for infringement of a trade-mark. During the proceedings it was found that the named plaintiff had been dead for many years, and that the business had been carried on by the widow, his executrix, and an application was made to substitute her name as plaintiff for that of the dead man. Russell J. in dismissing the application held that the parties to the action must be living at the time the action is brought and that the Order did not justify the Court in creating a plaintiff in the action for the first time. (1) It is said in the present case that the original plaintiff is non-existent, and on the principle of Russell J.'s decision a living person cannot be substituted for a firm which never had any existence. In my judgment that case is not applicable here. Order XLVIIIA. enables persons carrying on business in partnership to sue or be sued in the firm name, but that is a rule made for convenience, and an action by or against a firm notwithstanding the rule remains an action by or against the individual members of the firm. That appears from the rule itself, which enables the other side to ascertain at once the names and addresses of the individuals. Such an action remains therefore an action by or against individuals, and consequently I am not being asked to substitute a living person for a non-existent entity, but I am being asked to strike out the names of all the plaintiffs except one and to leave that one as the sole plaintiff. Under these circumstances, in my judgment I have power to do what I am asked to do, and I think that I ought to exercise my discretion in the applicant's favour and allow the amendment; but, since the necessity for this application is wholly due to the applicant's own mistake, he must pay the costs of the action up to date, including therein the costs of this application and of the defendants' summons.

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(1) [1920] 2 Ch. 24.

Solicitors for plaintiff: *Pennington & Son.*

Solicitors for defendants: *Steavenson & Couldwell, for Rodgers & Co., Sheffield.*

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(1) [1920] 2 Ch. 26.

R. A. Y.

In re FARMER.

FARWELL J.

1938
Nov. 17.

NIGHTINGALE *v.* WHYBROW.

[1938. F. 1189.]

Will—Construction—Annuity—Direction to appropriate fund—Gift over "subject to the payment of the said annuity"—Estate insufficient—Administration.

A testatrix who died in 1937 bequeathed pecuniary legacies to several persons and a life annuity to M. W., directing that there should be set aside and invested a sum the income whereof would then be sufficient to pay it, and giving her trustees power to resort to the capital of the appropriated fund whenever the income should be insufficient. Subject to the payment of the annuity, the fund or so much thereof as should not be resorted to to make up the deficiency of income was to be held in trust for certain persons. The estate was insufficient to provide in full for the legacies and for the fund directed to be appropriated:—

Held, that the annuitant was entitled to be paid the actuarial value of the annuity, abated if necessary proportionately with the legacies, though the result might be that the persons ultimately interested in the fund directed to be appropriated would receive little or nothing.

In re Nicholson. Chadwych-Healey v. *Crawford* [1938] 3 All E. R. 270 distinguished.

ADJOURNED SUMMONS.

By her will dated September 17, 1935, the testatrix Adelaide Farmer, who died on June 4, 1937, bequeathed, free of duty, several pecuniary legacies amounting to 3850*l.* including a settled legacy of 250*l.* By cl. 5 it was provided: "(1.) I bequeath free of duty to my companion, Minnie "Isabella Whybrow, an annuity of 300*l.* for her life without "power of anticipation during any coverture to commence "from my death and be considered as accruing from "day to day but to be paid by equal quarterly payments ". . . . (2.) I direct my trustees to set apart as soon as "conveniently may be and invest in their names . . . . a sum "the income whereof when invested shall be sufficient at the "time of investment to pay the said annuity and to pay the "same accordingly with power to resort to the capital of the "appropriated fund whenever the income shall be insufficient "and until such sum shall be so appropriated. I charge my "residuary personal estate with the said annuity, but after "appropriation my residuary estate shall thereby be discharged "from the said annuity. (3.) Subject to the payment of the "said annuity the appropriated fund or so much thereof as "shall not be resorted to to make up the deficiency of income "shall be held by my trustees upon trust for them my brother "the said Oscar Harry Martin and my sisters the said Blanche "Fisher, Villette Chambers and Lorna Hoyle as shall be "living at my death and if more than one in equal shares as "tenants in common . . . ." By cl. 7, the testatrix bequeathed the residue of her real and personal estate to Lorna Hoyle.

The amount available to provide for the pecuniary legacies and the annuity after payment of debts and funeral and testamentary expenses was approximately 8706*l.* The duty on the legacies was 350*l.* The sum required to purchase 2½ per cent. Consols sufficient to provide an income to meet the annuity was approximately 9000*l.* The capital value of the annuity was 2200*l.* 5*s.* 6*d.* and the legacy duty payable in respect thereof was 220*l.* 0*s.* 6*d.*

On July 27, 1938, the trustees took out a summons to determine (inter alia) whether Minnie Isabella Whybrow should be treated as a pecuniary legatee of a legacy equal to the capital value of the annuity or whether the sum required to provide for the annuity in full should after abatement be set aside as a fund out of which the annuity was to be paid in full.

M. C. Adams for the plaintiffs.

G. P. Slade for the annuitant. The capitalized value of the annuity should be paid over to the annuitant. There is no doubt that the general principle applicable to cases where an annuity and pecuniary legacies are bequeathed by will is that, if the estate is only sufficient to pay the capitalized value of the annuity, the annuitant is entitled to that sum. That principle being prima facie applicable, the matter is not changed by the fact that there is a gift over to other persons who are plainly not entitled to anything unless the annuitant has been paid in full. It is not the same thing to receive the income of an abated fund and to be paid the capitalized value of the annuity. It is not right that the annuitant should get less than the capitalized value. *In re Nicholson. Chadwych-Healey* v. *Crawford* (1) appears to be against this contention, but is distinguishable on the language of the will and on the facts. I rely on the words " subject to the payment of the "said annuity " in cl. 5, sub-cl. 3, of this will. That means that the persons interested after the annuitant's death are only to take if and when the annuity is paid in full. The course suggested by those persons does not give effect to the true principle.

E. M. Winterbotham for the legatees adopted this argument.

R. L. Edwards for Oscar Harry Martin, Blanche Fisher and Villette Chambers. The matter should be dealt with by assessing the fund required to produce the annuity and abating it along with the other legacies. The annuity should be paid out of the income of the abated fund, the deficiency being made up out of the capital. There is a distinction between the case where the appropriated fund on cesser of the annuity falls into residue and the case where it is disposed of to other beneficiaries. The method of paying the annuitant the capitalized value of the annuity would in the latter case defeat the rights of the persons so interested : *In re Nicholson. Chadwych-Healey* v. *Crawford.* (1) The distinction sought to be drawn between that case and the present is a distinction without a difference. In that case the persons ultimately interested in the fund were only given so much as was not expended in payment of the annuity. In the present case it could not be the intention of the testatrix that the gift to those persons should be entirely defeated.

William Cook for Lorna Hoyle adopted this argument.

FARWELL J. [having stated the facts :] It is obvious that the estate is insufficient to pay the legacies and the annuity in full and that there must be an abatement. The difficulty which I have to solve is how the abatement is to be effected in relation to the annuity which is given to Miss Whybrow having regard to the direction to set aside a sum, the income of which shall be sufficient to meet it with a gift over of the sum so set aside.

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(1) [1938] 3 All E. R. 270.

If this were the ordinary case of an annuity and nothing more, there would be no doubt as to the proper mode of procedure. The actuarial value of the annuity would be ascertained, all the legacies would abate proportionately and the annuitant would take the abated portion of the capital value of her annuity. On the same principle the sum of 250*l.*, which is settled for the benefit of the sister and her children, would abate, together with the other legacies, and the amount of the abated sum be retained as being the capital sum of which the income was payable to the sister for life with remainder over. When, however, one comes to deal with the abatement of this annuity, a question arises because if the ordinary rule is applied and the capital value of the annuity ascertained and that capital sum abated and paid to the annuitant, there may be nothing left out of which the gift over can take effect, with the result that if this method is adopted the persons ultimately interested in the fund may get nothing.

The question is not, I think, free from difficulty, and it has been already considered by Crossman J. in a case which is not dissimilar to this: *In re Nicholson. Chadwych-Healey* v. *Crawford.* (1) That decision is only reported in a series which are not authorized reports; the judgments are not revised by the judges and they ought not, in my view, to be treated as authorities in any sense of the word. But, on the other hand, I cannot, I think, properly refuse to look at them to see how far they will assist me in arriving at a conclusion on this matter. It must be borne in mind in this case as in most others of this sort that the questions depend on the construction of the particular document before the Court, and that generally speaking, unless some rule of construction or principle of law is concerned, authorities are of little assistance. The fact that one judge has come to a conclusion on the wording of

(1) [1938] 3 All E. R. 270.

a document which contains certain language and phrases is not necessarily of any assistance to another judge who has to deal with a document in different language. Such a decision may not be any guide in another case. I confess that, having read Crossman J.'s judgment, I feel some difficulty in applying its reasoning to the present case. It seems, from what the learned judge said, that he thought, on the true construction of the will before him, that the persons ultimately interested in the appropriated fund had some rights in it which were pari passu, so to speak, with those of the annuitant, and which led him to the conclusion to which he came, but those considerations are, in my judgment, not applicable in this case. Crossman J.'s decision was based on the footing that on the construction of that will the annuitant and the persons who were to take the appropriated fund after her were equally interested in it, and that, therefore, the Court was no more entitled to destroy the rights of one rather than those of the other.

In my judgment, in the present case, that is not the position. What the annuitant is given is the right to receive a sum of 300*l.* in each year. She is given that apart altogether from anything which may be given to other persons. For the purpose of discharging the residuary estate so as to permit it to be distributed, the testatrix has directed the trustees to set aside a capital sum, the income of which is to be applied in paying the annuity, with a right to resort to capital if the income is insufficient. That capital sum when set aside is the fund which can alone be looked to as between the annuitant and the residue for the payment of the annual sum to which the annuitant is entitled, and the annuitant is entitled, if necessary, to the whole of it. Her rights to the annuity as between herself and the persons who may take the appropriated fund after her death, in my judgment, are paramount. Everything given to them is given " subject to the payment of the "said annuity," and that means, in my judgment, subject to satisfying the annuity in full, so that nothing is to go to those persons who take after the annuitant's death until the annuitant has been given to the fullest extent, so far as the fund permits, all that she is entitled to in respect of her annuity. On this construction of the will, by adopting the course which I propose to adopt, I am not doing what Crossman J. called destroying the gift to these persons. I am not destroying anything. I am giving effect to the intention of the testatrix by satisfying in full, so far as it is possible, the rights of the annuitant. That may result in little or nothing being left for those who would take under the gift over after her death, but that is because the testatrix has given her rights which she is entitled to have satisfied in priority and which may exhaust the whole fund. The right of the annuitant in this case, since the estate is insufficient, is to have the annuity valued and to have that sum, when abated if necessary, paid out to her. The effect of that may be that little or nothing will go to those who would have taken the appropriated fund or what was left of it if no abatement had been necessary. The misfortune of those persons is due to the fact that the estate is insufficient, but only in that way can I give effect to what, in my judgment, on this will is the clear intention of the testatrix, namely, that the annuitant has the first right. Her right to her annuity has first to be satisfied before those who would take on her death are entitled to benefit. I think the point is illustrated quite aptly in this particular will in the distinction to be drawn between this gift of an annuity and the gift of the legacy of 250*l.* which is settled. In the latter case the legacy has to abate if necessary and the abated sum has to be invested and the income paid to the sister with remainder over, but in the case of the annuity there is no question of giving the annuitant a life interest in anything at all; she has a right to her annuity and that right is one which can only be given effect to by valuing the annuity, making any necessary abatement and paying to her that sum when abated. The persons who would otherwise have taken on the death of the annuitant may get little or nothing, because little or nothing may be left for them when the annuitant has been given that which she is entitled to on this will, her paramount rights.

I propose in this case to make a declaration that the annuitant is entitled to have the capital value of her annuity, abated if necessary, paid over to her.

FARWELL J.

1938

FARMER, *In re.*

NIGHTINGALE *v.* WHYBROW.

Solicitors: *Frank Taylor & Nightingale; Rye & Eyre.*

F. H. C.

CROSSMAN J.

1939

March 16, 17.

In re COLIN COOPER (DECEASED).

LE NEVE-FOSTER *v.* NATIONAL PROVINCIAL BANK AND OTHERS.

[1938. C. 3958.]

Will—Legacy—Secret trust—Sum given on verbal trusts communicated to trustees—Additional sum given on secret trusts by later testamentary disposition—No communication to trustees—Knowledge and acquiescence by trustees—Validity of later gift.

A testator by his will gave a sum of money by way of secret trust to trustees to whom he had communicated the trusts in his lifetime. These trusts were acquiesced in by the trustees. By a later additional testamentary disposition the testator gave a further sum on the same secret trust to the same trustees but the trustees had no knowledge of the further gift until after the testator's death:—

Held, that the later gift failed.

The principle laid down in *Blackwell* v. *Blackwell* [1929] A. C. 318 followed and applied.

ORIGINATING SUMMONS.

This was an originating summons taken out by the plaintiff, F. Le Neve-Foster, the sole proving executor of the wills and codicil of one Colin Cooper for the determination of certain questions arising upon his death.

The first-named defendants were the National Provincial Bank, who, together with one F. Wilson (also a defendant to the summons) and the plaintiff, were appointed executors and trustees of a will made in 1938 by the said Colin Cooper, which purported to revoke a previous will made by him in 1931. Other defendants were Charles V. Troughton, who together with the defendant F. Wilson and the plaintiff were appointed executors and trustees of the will made in 1931 above mentioned. The remaining defendants were the widow of Colin Cooper, Mrs. T. Cooper, and the two children of the marriage, both being infants; the last remaining defendant being the beneficiary of a pecuniary legacy given under a secret trust hereinafter more particularly referred to.

By a will dated July 13, 1931, the above mentioned Colin Cooper (hereinafter called "the testator") appointed the plaintiff and the defendants F. Wilson and Charles V. Troughton executors and trustees thereof and trustees for the purposes of the Settled Land Act, 1925. The testator by this will settled his real and personal estate generally on the usual trusts for his wife and children (the defendants above mentioned), and the will contained the usual clauses as to bequests of legacies, trusts of income and capital moneys with remainders over, and directions to trustees regarding trust for sale and conversion, the payment of his funeral and testamentary expenses and debts, the investment of the settled trust fund, and ultimate trusts for his children and their issue therein more particularly mentioned.

In 1938 the testator made a second will dated February 10, 1938, and thereby appointed the plaintiff, the defendant F. Wilson, and the first-named defendants, the National Provincial Bank, executors and trustees thereof. By this will he revoked the previous will made in 1931, and by a clause thereof gave some weekly sums (inter alia) to his stud groom, by name Stapleton, and his head gardener, Mann, on the terms therein mentioned. Clause 6 was as follows: "I bequeath to the said Fermian Le Neve-Foster [the "plaintiff] and Frank Wilson [defendant] the sum of five "thousand pounds free of duty upon the trusts which I have "already communicated to them with respect thereto." By this will the real estate of the testator was not settled specifically but dealt with generally in the residuary devise and bequest to his wife and children.

With regard to the bequest contained in clause 6 of the above mentioned will the evidence adduced at the hearing before the Court was to the effect that the testator had, before executing the will, verbally communicated his wishes regarding these trusts to the defendant F. Wilson and one of the attesting witnesses to the will as representing the plaintiff, who at that time was abroad, but to whom these trusts were communicated by the witness immediately on the plaintiff's return. According to a memorandum made at the time by the attesting witness the trusts so communicated were to the effect that the sum of 5000*l*. mentioned in clause 6 was to be held by the defendant F. Wilson and the plaintiff as to the income thereof upon a protective trust for the benefit of the last-named defendant to the summons for life and upon death the capital of the settled fund was to fall into the testator's residuary estate.

Shortly after the execution of this will the testator went to Africa, and while on a big game shooting expedition he contracted a serious illness and died on March 29, 1938. Two days before his death, namely on March 27, the testator made and signed the following testamentary disposition: "This is my last will and cancels the will I made about "February 8 or 9, 1938, before leaving England and puts back "in its complete form the previous will, with the exception "that my executors will be Fermian Foster and the National "Provincial Bank and my bequests to Stapleton and Mann "hold good. The sum of 5000*l*. bequeathed to my trustees in "the will now cancelled is to be increased to 10,000*l*. they "knowing my wishes regarding this sum."

Later on the same day the testator signed a further document as follows: "The investments regarding the will are "held entirely in the hands of my trustees and not as laid down "in the will made many years ago." Subsequently, after the testator's death, proceedings took place in the Probate Division, and as a result, on June 2, 1938, both the will dated July 13, 1931, that of February 10, 1938, and the two documents executed on March 27, 1938, were all admitted to probate as representing the testator's will and all treated as the document in which the testator's last will was contained.

Both the plaintiff and the defendant F. Wilson by affidavits denied that the increase in the legacy of 5000*l*. bequeathed by clause 6 of the will of the testator dated February 10, 1938, to 10,000*l*. referred to in the testamentary disposition of March 27, 1938, was ever communicated to them by the testator in his lifetime.

One of the questions (No. 7) asked by the above mentioned originating summons dated November 19, 1938, was as follows:—

7. As to the increased legacy of 10,000*l.* bequeathed by the will dated March 27, 1938, (*a*) whether the same is bequeathed to the plaintiff and the defendant Frank Wilson as trustees, or, if not, to what persons is the same bequeathed as trustees, and (*b*) whether the same is effectually bequeathed as to the said sum of 10,000*l.* or some and what part thereof or whether the same fails in whole or in part.

Wilfrid Hunt for the plaintiff.

Hon. Charles R. Russell for the National Provincial Bank.

Bernard F. Mendel for the defendants F. Wilson and C. V. Troughton.

J. V. Nesbitt for the defendant widow, Mrs. Cooper, and the two infant children. The first given legacy of 5000*l.* remains but not the increase.

Roger Turnbull for the last-named defendant, the beneficiary under the secret trust. The added legacy takes effect. The argument that it cannot is based on a fallacy, and trusts are being confused with the subject of trusts. If the trusts are communicated, it does not matter that the trustees are in ignorance of the quantum. *Blackwell* v. *Blackwell* (1) is relied on. Here the testator has simply by a codicil (so to speak) increased a legacy given by the will. The words of Lord Sumner in *Blackwell* v. *Blackwell* (1) on the last four lines on p. 339, it is submitted, cover my case. Here there is a complete trust. See also Lord Warrington's remarks in *Blackwell* v. *Blackwell.* (1) It is submitted that this additional gift is operative. The purpose of the trust has been communicated and has been accepted. Compare Hawkins on Wills, 3rd ed., p. 355.

CROSSMAN J. [after dealing with other questions raised in the summons, continued :]

The point, raised by question 7 of the summons, arises in this way. [His Lordship referred to the material portions of the wills made by the testator in 1931 and 1938.] Before I go on to the later will I will state what is the evidence as

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(1) [1929] A. C. 318, 339, 341.

CROSSMAN J.

1939

COLIN COOPER, *In re.*

LE NEVE-FOSTER *v.* NATIONAL PROVINCIAL BANK.

regards the sum given under clause 6. The evidence is contained in an affidavit of one of the attesting witnesses. He says: “I was one of the attesting witnesses to the testator's “will dated February 10, 1938”—that is the will containing the clause that I have just read—“and I prepared that will on the “testator's instructions. Before he executed that will the “testator verbally communicated to the defendant Frank “Wilson and myself the trusts on which he desired the 5000*l.* “legacy bequeathed by clause 6 of such will to be held. In “order to record such trusts I made a memorandum setting “them out and I made this on the same day. Such memoran-“dum is now produced and shown to me marked . . . . ., and “correctly sets out what the testator said. I made out such “memorandum simply for my own satisfaction. The testator “made such statement to me as representing the plaintiff as “the plaintiff happened at that date to be absent in France “temporarily and during his absence I represented him. The “plaintiff returned to London a few days later and I at once “informed him of the contents of clause 6 of the will and of “the said trusts. The testator on February 10, 1938, had asked “me to inform the plaintiff on his return as to the said trusts.” Then the memorandum which he made, immediately after the verbal communication by the testator, was to this effect: [His Lordship read the terms of the memorandum referred to above.]

That was the evidence as to what occurred at the time of the execution of this will on February 10, 1938. Shortly afterwards the testator went to Africa on a big game shooting expedition. He was taken ill; he was brought down to a hospital in Kenya Colony, and there on March 27, 1938, he made the following testamentary dispositions: “This is my last will and cancels “the will I made about February 8 or 9, 1938,”—it is accepted generally that he is referring there to the will of February 10, 1938—“before leaving England and puts back in its complete “form the previous will,”—again I think it is generally accepted that that means the will of July 13, 1931—“with “the exception that my executors will be Fermian Foster and “the National Provincial Bank and my bequests to Stapleton “and Mann hold good. The sum of 5000*l.* bequeathed to my "trustees in the will now cancelled is to be increased to 10,000*l.* "they knowing my wishes regarding this sum." On the same day, Sunday, March 27, 1938, he signed another short document which has been proved, but which does not affect this present question. The testator died two days later, namely on March 29, and after proceedings in the Probate Division, both the will of July 13, 1931, the will of February 10, 1938, and the two documents executed on March 27, 1938, were all admitted to probate as representing the testator's will. I have to treat those four documents together as constituting his effective testamentary disposition.

The question which has now arisen is this. It is admitted that the gift of 5000*l.* made by the will of February 10, 1938, has been excepted from the cancelling of that will and remains as if it were incorporated in the will of 1931—there was no such provision in the will of 1931—and it is not disputed here by anybody that, so far as regards that gift of 5000*l.*, it is an effective gift, because the trusts on which it was to be held by the trustees to whom it was bequeathed were communicated to the legatees in the lifetime of the testator, in fact before the execution of the will; and therefore in accordance with the principles which were laid down and followed in *Blackwell* v. *Blackwell* (1) those are good trusts which can be enforced and take effect. The question is whether the gift of the sum of 5000*l.* which was added to that by the testator by the first of the two documents executed on March 27, 1938, is also valid. For the purpose of arriving at a decision on that question I have to consider the principle upon which the gift of 5000*l.* by the will of February 10, 1938, is held to be good. Looking at the case of *Blackwell* v. *Blackwell* (1) in the House of Lords, I find that it is laid down there that communication of the purpose for which a legacy is given to a legatee and acquiescence by the legatee in that purpose or a promise on his part to carry it out are the essential matters which render a legacy given on a so-called secret trust valid. On p. 339 of the report in the House of Lords, Lord Sumner says this in his judgment: "It is

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(1) [1929] A. C. 318, 339.

CROSSMAN J.

1939

COLIN COOPER, *In re.*

LE NEVE-FOSTER *v.* NATIONAL PROVINCIAL BANK.

"communication of the purpose to the legatee, coupled with "the acquiescence or promise on his part, that removes the "matter from the provision of the Wills Act and brings it within "the law of trusts, as applied in this instance to trustees, who "happen also to be legatees." The further point which was decided in *Blackwell* v. *Blackwell* (1) is that the principle applies in the same way to a legacy given to a trustee *expressly* upon trust as to a legacy given without any disclosure of a trust. It had previously been accepted that, where a legacy was given to a person without any expression of a trust and that person at the same time was informed that he held it upon a trust, and he either expressly undertook to perform that trust or allowed the legacy to remain without saying he would not carry it out, that was a trust which the Court could enforce. Since *Blackwell* v. *Blackwell* (1) the same principle applies even if the legacy is given to a trustee *expressly* upon a trust. But what I have to consider here is whether in this first document of March 27, 1938, the further 5000*l.* which is bequeathed (because I regard the gift here as an additional 5000*l.* bequeathed to the same trustees) can be governed by the same principles as the original 5000*l.*, notwithstanding the fact that the bequest of the second 5000*l.* was not communicated to the trustees, that in fact they were not aware of it until after the death of the testator. It seems to me that I must treat this gift in that document of March 27, 1938, as an additional sum of 5000*l.*, and at present I cannot see how I can arrive at the conclusion that the trustees ever accepted a trust either impliedly or expressly with regard to the second 5000*l.* What they did, as the evidence clearly shows, is this: they accepted the trust as regards the first 5000*l.*, and it seems to me that the suggestion which Mr. Nesbitt has put before me, that if the gift of the second 5000*l.* is held to be good, a gift in the same way of the whole of the residuary estate would be equally good, is a reductio ad absurdum which shows that this does not come within the principle which, as extended in *Blackwell* v. *Blackwell* (1), is now binding on me. It may be that the testator wished and intended to give it in this way, but the

(1) [1929] A. C. 318.

question is, whether he can give it in this way. He has chosen to give it on what is known as a secret trust, and the limit of the extent to which a secret trust can be enforced is at present shown by *Blackwell* v. *Blackwell.* (1) I do not find in that case anything which would enable me to say that the gift of the second 5000*l.* is subject to a trust which can be enforced.

It seems to me that the result here is that the gift of the first 5000*l.* remains good and the sum is held upon the trusts expressed by the testator to the trustees previously to the will of February 10, 1938, but that the gift of the second 5000*l.* fails.

Solicitors: *Warren, Murton, Foster & Swan; Elvy Robb & Co.*

(1) [1929] A. C. 318.

A. R. LL.-T.

MORTON J.

1939

Feb. 6, 7, 8.

WALLINGTON *v.* TOWNSEND.

[1937. W. 2512.]

Vendor and purchaser—Contract—Plan—Mistake on plan—Parties not ad idem—Rectification—Damages.

The defendant owned two adjacent bungalows and agreed to sell one to the plaintiff. The plan to the draft contract was a copy of a plan of the property before it had been altered. According to the boundary shown on this plan, the property agreed to be sold to the plaintiff included a strip of land (called during the hearing, "the disputed strip") which comprised part of the bath-room and part of the lavatory of the other bungalow and some land not covered by buildings on which were drains from the other bungalow and a coal-box for its use. The defendant signed the contract having neither read it nor looked at the plan. She had not intended to sell the disputed strip or any part of it. The plaintiff, however, had intended to buy part of it, had thought she was doing so, and, when the defendant discovered the mistake in the plan and refused to complete, wished to complete on the footing that the boundary of the property was that shown on the plan. The defendant persisted in her refusal, and in this action the plaintiff claimed the return of the deposit which she had paid and damages for the defendant's breach of contract. The defendant counterclaimed for a declaration that the disputed strip was not included in the contract, or, alternatively, for rectification. The counterclaim failed, since it was held that on the true construction of the contract and plan the disputed strip was included in the contract, and the defendant had not proved that the parties were ad idem and had a common intention which they had not carried out, and she was therefore not entitled to rectification. There was no evidence that the value of the property was greater than the purchase price :—

Held, that, where a vendor fails to complete for reasons other than defect in title, and the purchaser does not prove damages by way of loss of bargain, the plaintiff is entitled, by way of damages, in addition to the return of the deposit, to interest in respect of the loss of the use of the deposit and to the costs of approving and executing the contract, investigating the title and preparing the conveyance, and of searches.

In re Daniel [1917] 2 Ch. 405 distinguished.

WITNESS ACTION.

In this action a purchaser claimed return of a deposit and damages for the vendor's failure to complete a contract for sale. The vendor counterclaimed for a declaration that the contract did not include certain land which the purchaser contended that it did include, or, alternatively, for rectification.

By the contract, dated June 8, 1937, Mrs. Charlotte Jane Wallington (hereinafter called "the plaintiff") agreed to buy and Mrs. Bertha Townsend (hereinafter called "the defendant") to sell "all that piece of land" (therein described) "together with the bungalow called 'Seaspray East' and "the garage now standing thereon . . . . as the same is more "particularly delineated on the plan annexed hereto and "thereon coloured pink."

Seaspray East had been conveyed to the defendant in 1922, and in 1929 a bungalow next to it, called Seaspray West, was conveyed to her. She then converted the two bungalows into one, and the property so remained until the end of 1932, when she again made it into two bungalows.

The plan to the contract of 1937 was an exact copy of that on the conveyance of 1922 to the defendant. It thus took no account of the alterations which she had made, and the boundary which it purported to define between the bungalows gave to Seaspray East a strip of land (called during the hearing "the disputed strip") on which were part of the bathroom and part of the lavatory of Seaspray West, a coal box for the use of Seaspray West, and drains leading from Seaspray West. This mistake the defendant did not notice until after contracts had been signed and exchanged and the date for completion fixed. She refused to complete; but the plaintiff claimed that the plan was correct and that she had intended to purchase part of the disputed strip and she claimed a declaration that, by reason of the defendant's breach of the contract of 1937, she was entitled to repayment of the deposit which she had paid and to damages. The defendant counterclaimed for a declaration that the contract, on its true construction, did not include the disputed strip or, alternatively, for rectification.

Morton J. held that on the true construction of the contract and the plan the disputed strip was included in the contract. He also held that the plaintiff intended to purchase part of the disputed strip and that the defendant was not entitled to rectification. The case is reported only on the question of damages.

Lionel L. Cohen K.C. and *J. G. Craufurd* for the plaintiff submitted arguments on the question of construction.

E. M. Winterbotham for the defendant, after dealing with the question of construction and other matters: If the plaintiff is entitled to damages, the measure of the damages would be the difference between the value of the property at the date at which it ought to have been conveyed to her and the price which she should have paid for it. There is no other measure of damages in a case which does not come within *Bain* v. *Fothergill.* (1) But she is not entitled to damages, as she has not proved that the value of the property exceeds the purchase price. The defendant has not completed, not because defects in the title prevented her from doing so, but because she did not wish to do so on the basis of the plan. Therefore the rule in *Flureau* v. *Thornhill* (2) that a contractor for the purchase of a real estate, to which the title proves (without collusion) defective, is entitled to no satisfaction for the loss of his bargain, does not apply. Further, the plaintiff cannot recover even the money which she has spent, and she certainly cannot recover damages for the loss of bargain, for she has not proved any loss of bargain. [He referred to *Engell* v. *Fitch.* (3)]

Lionel L. Cohen K.C. in reply. It may be that, where the failure to complete is due, not to defect in title, but to wilful refusal by the vendor, the purchaser cannot recover damages for the loss of the bargain, if he is unable to prove any such loss; but in any event the purchaser is entitled to recover the deposit, with interest, and the costs which have been thrown away. [He referred to *Engell* v. *Fitch.* (3)]

E. M. Winterbotham in reply on the claim for damages. Damages are not a punishment to the person breaking the contract, but compensation to the person losing it, and if, after losing it, he is actually better off, he cannot get damages.

(1) (1874) L. R. 7 H. L. 158.
(2) (1754) 2 W. Bl. 1078.
(3) (1869) L. R. 4 Q. B. 659.

What has been spent in trying to obtain a bargain cannot be recovered as damages for the loss of it: *In re Daniel.* (1)

MORTON J. [after dealing with the questions of construction of the contract and rectification, and holding that the counterclaim failed, continued :]

The last question, which is, I think, of considerable interest is, what is the measure of damages in this case, the position being that the defendant has refused to perform what I have held to be the contract, the plaintiff has not adduced any evidence of damage caused by loss of bargain, and the defendant's failure to carry out the contract was not caused by any defect in her title ?

Under those circumstances, Mr. Winterbotham, for the defendant, says that the plaintiff is not entitled to damages. He contends (and, so far, I agree with him) that the rule in *Flureau* v. *Thornhill* (2), which is fully discussed in *Bain* v. *Fothergill* (3), applies only where the failure to complete is due to a defect in the vendor's title. He contends also that the purchaser cannot recover even the expenses to which she has been put, which I think I may conveniently call the conveyancing costs, and that she cannot recover any damages for loss of bargain, for no such damages have been proved.

That proposition, if it were correct, would lead to very curious results. First, if Mr. Winterbotham is right, a vendor of property who is unable to complete owing to a defect, perhaps unsuspected, in his title, is in a worse position from the point of view of damages than a vendor who, having a perfectly good title, merely refuses to complete. That seems to me to be startling, and to lead to the further result, that it would perhaps encourage a vendor, repenting of his bargain, to refuse to carry it out. It is true that there is always the remedy of specific performance ; but, supposing that damages were to be assessed against such a vendor, they would, according to Mr. Winterbotham, be nil, unless the purchaser could prove damage arising from loss of his bargain.

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(1) [1917] 2 Ch. 405.

(2) 2 W. Bl. 1078.

(3) (1874) L. R. 7 H. L. 158.

I do not think that that can be the true view. It appears clearly from *In re Daniel* (1) that, in cases where the failure to complete is not due to any defect in the vendor's title, damages can be given for loss of bargain. It also appears from that case that if a purchaser gets, as such damages, the full amount of the difference between the purchase price and the value of the property, he cannot also recover the conveyancing costs. The reason for that is stated by Sargant J., as he then was. He says : " Weighing one thing with another, "I have come to the conclusion that the value of the property "on the whole was very much nearer 1000*l*. than the sum of "1500*l*. I put the value at 1125*l*., and accordingly I allow the "company's claim at 125*l*." (That was in his view the proper amount of the damages for loss of bargain.) " That being so, "of course, they cannot have, in addition to the 125*l*., the costs "of investigating the title—that is, the 37*l*. odd which the "Master allowed them. I do not think that was contended "for by Mr. Maugham ; and indeed such a claim could not "be supported, for this reason, that the basis of the estimate "of the loss is the difference between the value of the property "if it had been conveyed to them in accordance with the "contract and the price given for the property, which "difference I have put at 125*l*. If they had had the property "conveyed to them, of course they would have had to incur "all the expense of investigating the title that they did "actually incur. Therefore it is impossible to give them that "sum in addition to the sum by way of general damages."

Under these circumstances, is a purchaser who has been deprived of his bargain by the vendor's default, but who cannot prove that the value of the property is greater than the purchase price, entitled to no damages at all ? I do not take that view. In the present case, the position is this : The purchaser was willing to incur the conveyancing costs by reason of the fact that she was willing to exchange the 925*l*. in her possession for the property which she wanted. The vendor has refused to convey that property and the purchaser, it is true, retains her money ; but she has not got the property which she wanted and she has become liable to pay these costs. This is not a case where the damage which she could recover would necessarily be limited to the amount of the conveyancing costs. If she could prove that the property was worth more than 925*l.*, she could recover the difference as damages, but in that event she could not recover the conveyancing costs as damages, for the reason given by Sargant J. Being unable to prove this fact she is, in my view, entitled to recover the conveyancing expenses to which she has been put. I think the true view is that in a case where the vendor under a contract for the sale of land has refused to carry out the contract, and the failure to carry out the contract is not due to a defect in the vendor's title, the damages are at large and the Court can give such damages as, according to general principles, it thinks right.

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(1) [1917] 2 Ch. 405, 412.

Mr. Winterbotham has agreed that, if I think the plaintiff is entitled to damages, the damages shall be those specified in the amended statement of claim and he does not dispute that under the circumstances of the present case, as I have held that the party in default is the vendor, the purchaser is entitled to the return of the deposit.

I propose, therefore, to make a declaration that the plaintiff is entitled to the repayment by Messrs. Leggett of the deposit of 92*l.* 10*s.* and to award the plaintiff, by way of damages for breach of contract, interest at the rate of 4 per cent. from May 17, 1937, in respect of the loss of the use of the deposit of 92*l.* 10*s.* handed to Messrs. Leggett on that date, damages in respect of the costs of approving and executing the contract amounting to 4*l.* 0*s.* 6*d.*, and damages in respect of the costs of investigating the title and preparing the conveyance and searches amounting to 12*l.* 2*s.* 7*d.*

Solicitors: *Guy C. Wallington, for J. C. Buckwell & Wallington, Brighton; Waterhouse & Co., for Coleman & Co., Hove.*

K. R. A. H.

MORTON J.

1939

Feb. 27.

In re A DEBTOR.

[No. 1035 of 1938.]

Bankruptcy—Deceased insolvent's estate—No personal representative—Creditors' petition for administration in bankruptcy—Jurisdiction of Court—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 130, *sub-s.* 2—*Bankruptcy Rules,* 1915, *r.* 303.

Creditors of a deceased debtor's estate petitioned under s. 130 of the Bankruptcy Act, 1914 (which deals with the estates of deceased insolvents), for an order for the administration of the estate in bankruptcy, alleging in the petition that they were informed and believed that the will had not been proved as the executors had renounced probate, and that the deceased's legal personal representative had not applied for letters of administration.

By s. 130, sub-s. 2, of the Bankruptcy Act, 1914: " Upon the " prescribed notice being given to the legal personal representative " of the deceased debtor, the court may, in the prescribed manner, " upon proof of the petitioner's debt, ... make an order for " the administration in bankruptcy of the deceased debtor's " estate, ... "

By r. 303 of the Bankruptcy Rules, 1915: " In any case in " which an administration order under s. 130 of the Act has " been made, and it appears to the Court on the report of the " Official Receiver that no executor or legal personal representa" tive exists, the account, list, and statement mentioned in the " last preceding Rule shall be made, verified and lodged by such " person as, in the opinion of the Court, upon such report, may " have taken upon himself the administration of, or may otherwise " have intermeddled with, the property of the deceased or any " part thereof " :—

Held, (1.) that r. 303 was not enough to establish that the Court could make an order although there was no executor or legal personal representative, and that the rule could be reconciled with the section by reading the rule as directed to a case where there was an executor or legal personal representative at the date of the making of the order, but the executor or legal representative had died after the date of the order;

(2.) that, on the true construction of s. 130, the Court had no power to make an order until a legal personal representative had been constituted.

PETITION.

Creditors of a deceased debtor's estate petitioned under s. 130 of the Bankruptcy Act, 1914 (which deals with estates of deceased insolvents), for an order for the administration of the estate in bankruptcy, alleging in the petition that they were informed and believed that the will had not been proved as the executors had renounced probate, and that the deceased's legal personal representative had not applied for letters of administration.

The registrar refused to make the order, on the ground that the words "upon the prescribed notice being given to "the legal personal representative" in s. 130, sub-s. 2, precluded administration until a legal personal representative had been appointed. He then, at the request of counsel, referred the application to the judge, as being an important matter for all creditors petitioning under the section on a question of the true construction of r. 303.

The application was at first in Court as Chambers, but was ultimately heard in Court.

P. B. Morle for the petitioning creditors. Rule 303 of the Bankruptcy Rules, 1915, gives some indication that the Court can order the administration in bankruptcy of a deceased debtor's estate, even though, at the time when the Court is asked to make the order, there is no executor or personal representative in existence: see *In re Sleet* (1), Bankruptcy Act, 1914, s. 130, sub-ss. 1, 2, 3, 4, 6, 7, 8 and 9; Bankruptcy Rules, 1915, ss. 299 to 303. Sub-s. 2 of the section and r. 303 of the Rules, taken together, enable the Court to make the order in the present case.

MORTON J. This case raises a short but important question on the construction of s. 130 of the Bankruptcy Act, 1914, namely, whether the Court has jurisdiction to make an order for the administration in bankruptcy of a deceased debtor's estate before any legal personal representative of the deceased debtor has been constituted.

Sect. 130, sub-s. 1, is: "Any creditor of a deceased debtor "whose debt would have been sufficient to support a bank-"ruptcy petition against the debtor, had he been alive, may "present to the court a petition in the prescribed form praying "for an order for the administration of the estate of the

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(1) [1894] 2 Q. B. 797.

"deceased debtor, according to the law of bankruptcy."

Sub-s. 2 is: [His Lordship read it, and continued:] It would appear, prima facie, that under that sub-section the court's jurisdiction to make the order arises only upon the prescribed notice being given to the deceased debtor's legal personal representative.

Sub-s. 3 is: "A petition for administration under this "section shall not be presented to the court after proceedings "have been commenced in any court of justice for the "administration of the deceased debtor's estate, but that "court may, when satisfied that the estate is insufficient to "pay its debts, transfer the proceedings to the court exercising "jurisdiction in bankruptcy, and thereupon such last-mentioned court may, in the prescribed manner, make an order "for the administration of the estate of the deceased debtor, "and the like consequences shall ensue as under an administration order made on the petition of a creditor." In the present case no proceedings have been commenced for the administration of the deceased debtor's estate in any other court.

Sub-s. 4 is: "Upon an order being made for the administration of a deceased debtor's estate, the property of the "debtor shall vest in the official receiver of the court, as "trustee thereof, and he shall forthwith proceed to realise "and distribute it in accordance with the provisions of this "Act." Then follows a proviso not here material.

I have been referred also to sub-s. 6, which is: "In the "administration of the property of the deceased debtor under "an order of administration, the official receiver or trustee "shall have regard to any claim by the legal personal representative of the deceased debtor to payment of the proper "funeral and testamentary expenses incurred by him in and "about the debtor's estate, and such claims shall be deemed "a preferential debt under the order, and shall, notwithstanding anything to the contrary in the provisions of this "Act relating to the priority of other debts, be payable in "full, out of the debtor's estate, in priority to all other debts." That sub-section gives an indication, to put it no higher, that it is contemplated that there will be a legal personal representative in existence.

Sub-s. 7, which contains another reference to the legal personal representative, is: " If, on the administration of a "deceased debtor's estate, any surplus remains in the hands "of the official receiver or trustee, after payment in full of "all the debts due from the debtor, together with the costs "of the administration and interest as provided by this Act "in case of bankruptcy, such surplus shall be paid over to "the legal personal representative of the deceased debtor's "estate, or dealt with in such other manner as may be "prescribed." That sub-section shows that the existence of a legal personal representative, to whom the surplus is to be paid, is contemplated.

Sub-s. 8 refers to " Notice to the legal personal representa-"tive of a deceased debtor of the presentation by a creditor "of a petition under this section," and enacts that such notice " shall, in the event of an order for administration "being made thereon, be deemed to be equivalent to notice "of an act of bankruptcy, and after such notice no payment "or transfer of property made by the legal personal repre-"sentative shall operate as a discharge to him as between "himself and the official receiver or trustee; save as aforesaid "nothing in this section shall invalidate any payment made "or any act or thing done in good faith by the legal personal "representative before the date of the order for administration."

Sub-s. 9 gives the legal personal representative power to present " A petition for the administration of the estate of "a deceased debtor under this section."

But for the rules, to which I shall now refer, it would seem to me plain that, on the construction of the section, the Court cannot make an order for the administration in bankruptcy until a legal personal representative has been constituted. Mr. Morle has referred me to rr. 299 to 303. Rule 301 is: "(1.) The petition shall, unless the Court otherwise directs, "be served on each executor who has proved the will, or, as "the case may be, on each person who has taken out letters "of administration. The Court may also, if the Court thinks "fit, order the petition to be served on any other person." That rule does not, in my view, supply any indication that an order can be made on the petition when no legal personal representative has been constituted. It appears to me to be directed merely to giving the Court power, if it thinks fit, to direct that the petition need not be served upon every one of a number of executors or a number of persons who have taken out letters of administration.

Rule 302 is: "When an administration order under "section 130 of the Act has been made it shall be the duty "of the executor or legal personal representative of the "deceased debtor to lodge with the official receiver forthwith "(in duplicate) an account of the dealings with, and administration of (if any), the deceased's estate by such executor "or legal personal representative, and such executor or legal "personal representative shall also furnish forthwith in "duplicate a list of the creditors, and a statement of the "assets and liabilities, and such other particulars of the "affairs of the deceased as may be required by the official "receiver." That rule places a duty on the executor or legal personal representative of the deceased debtor when an order has been made under s. 130. Again, so far as I have read, I should find it hard to reconcile the section and the rules with the view that the Court has power to make an order under s. 130 before a legal personal representative has been constituted.

I now come to r. 303 (on which Mr. Morle very properly relied), which is: "In any case in which an administration "order under section 130 of the Act has been made, and it "appears to the Court on the report of the official receiver, "that no executor or legal personal representative exists, the "account, list, and statement mentioned in the last preceding "rule shall be made, verified, and lodged by such person as "in the opinion of the Court, upon such report, may have "taken upon himself the administration of, or may otherwise "have intermeddled with, the property of the deceased, or "any part thereof." Mr. Morle argues that this rule indicates very strongly that the Court can make an order although no

MORTON J.

1939

A DEBTOR, *In re.*

executor or other legal personal representative exists. I agree that it assists his argument, but, to my mind, it is not sufficient to establish the proposition for which Mr. Morle contends. The rule may perfectly well be reconciled with the section by reading the rule as directed to a case where there was an executor or legal personal representative at the date of the making of the order, but such executor or legal personal representative died after the date of the order.

In those circumstances, there is this useful rule under which the account, list and statement, which in the ordinary way would be delivered by the legal personal representative, may be delivered by a person who has intermeddled with the estate. To read the rule in any other way, would be to read it in a manner directly contradictory to the provisions of the statute and, in particular, to s. 130, sub-s. 2, to which I have already referred.

Mr. Morle has urged on me that, from a business point of view, it would be extremely convenient and would save a great deal of delay and expense if the Act had the meaning for which he contends. That may well be the case, but, if there is any good reason why the Court should be given power to make an order for administration in bankruptcy before a legal personal representative has been constituted, that is a matter for the Legislature and not for the Court. I must construe s. 130 as it stands and I cannot give it the construction for which Mr. Morle contends.

I have been referred to the earlier sections which correspond with s. 130, that is to say, s. 125 of the Bankruptcy Act of 1883, as amended by s. 21 of the Bankruptcy Act of 1890. I need only say that, on referring to these Acts and to the case of *In re Sleet* (1), I find nothing which leads me to think that the view which I have formed as to the construction of s. 130 is incorrect.

I hold, on the point of law brought before the Court, that until a legal personal representative has been constituted, the Court has no power to make an order for the administration in bankruptcy of a deceased debtor's estate.

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(1) [1894] 2 Q. B. 797.

MORTON J.

1939

A DEBTOR, *In re.*

[His Lordship then adjourned the petition back into Chambers to stand over in accordance with the usual practice, until a legal personal representative should be constituted, and continued :] I think that the matter was properly brought to the Court's attention. I shall make the costs of this application costs in the petition.

I desire to add this : Mr. Morle very fairly told me in the course of his argument that in fact the practice of the registrars in bankruptcy had been invariably to refuse to make any such order until a legal personal representative had been constituted. That has in no way affected my decision in the matter, which is based entirely upon the construction of the Act and the Rules.

Solicitors : *Boyce, Evans & Sheppard.*

K. R. A. H.

In re A JUDGMENT DEBTOR.

[No. 2176 of 1938.]

C. A.
1938
Dec. 20.

Bankruptcy—Bankruptcy notice—French judgment registered in England—Judgments (Extension) Act, 1868 (31 *&* 32 *Vict. c.* 54), *ss.* 3, 4, 6—*Bankruptcy Act,* 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 1—*Administration of Justice Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 81), *s.* 9—*Foreign Judgments (Reciprocal Enforcement) Act,* 1933 (23 *Geo.* 5, *c.* 13), *s.* 2, *sub-s.* 1; *ss.* 4, 6.

Sect. 6 of the Foreign Judgments (Reciprocal Enforcement) Act, 1933, provides: "No proceedings for the recovery of a "sum payable under a foreign judgment, being a judgment to "which this Part of this Act applies, other than proceedings by "way of registration of the judgment, shall be entertained by "any court in the United Kingdom":—

Held, that a bankruptcy notice, based upon a judgment of a competent Court in France, cannot be set aside.

THIS was an appeal by the creditor against an order of Mr. Deputy Registrar Mellor setting aside a bankruptcy notice. The bankruptcy notice was founded upon a judgment of a competent Court in France for a sum amounting to something over 19,000*l.*, which had been registered pursuant to the Foreign Judgments (Reciprocal Enforcement) Act, 1933. The French judgment was delivered in June, 1937, the registration took place in July, 1938, and the bankruptcy notice was issued on October 6, 1938.

Cyril Salmon for the appellant. The provisions of s. 1 of the Foreign Judgments (Reciprocal Enforcement) Act, 1933, apply to France. Sect. 2 deals with the registration of foreign judgments, and its provisions have been complied with in this case. The words of s. 1 are of the widest nature, and must include bankruptcy. Under s. 6 a creditor who has obtained a judgment against a debtor in a foreign Court can only proceed in this country by way of registration. If the learned Deputy Registrar is right, creditors are now in a worse position than before the passing of the Act of 1933.

[SIR WILFRID GREENE M.R. referred to s. 4, sub-s. 1 (*a*) (i.), (ii.), (iii.), (iv.), (v.)].

If the matter is free from authority, those paragraphs are almost too clear for argument. There are two cases put against me, but I say they support me: *In re Watson* (1) is the first, but that case was under the Judgments (Extension) Act, 1868, and turned on the words "but in so far only as "relates to execution under this Act" at the end of s. 4. No such words are used in the Act of 1933. That case was followed in *In re a Bankruptcy Notice.* (2) Those two cases have no application here in view of the wide divergence of language in the Acts of 1868 and 1933. *Thompson* v. *Gill* (3) dealt with the same words in s. 4 of the Act of 1868. There are no such limitations in the Act of 1933, and this appeal ought to be allowed.

Douglas Lowe for respondent. The Foreign Judgments (Reciprocal Enforcement) Act, 1933, is the climax of a series of Acts. The Administration of Justice Act, 1920, is based on the Act of 1868.

If the word "proceedings" in s. 6 of the Act of 1933 was intended to extend to "bankruptcy proceedings" the Legislature would have said so. *Galbraith* v. *Grimshaw & Baxter* (4) referred to a garnishee order. On an application to set aside a bankruptcy notice, no question of the validity of the debt can be considered: Williams on Bankruptcy, 15th ed., p. 35.

There is no reason for setting aside the order of the Deputy Registrar. [He also cited *Yukon Consolidated Gold Corporation Ld.* v. *Clark.* (5)]

SIR WILFRID GREENE M.R. This is an appeal by the creditor against an order of Mr. Deputy Registrar Mellor setting aside a bankruptcy notice. The bankruptcy notice was founded upon a judgment of a competent Court in France for a sum amounting to the equivalent of something over 19,000*l.*, which had been registered pursuant to the Foreign Judgments (Reciprocal Enforcement) Act, 1933. That registration took place in July of 1938.

(1) [1893] 1 Q. B. 21.
(2) [1898] 1 Q. B. 383.
(3) [1903] 1 K. B. 760.
(4) [1910] 1 K. B. 339.
(5) [1938] 2 K. B. 241.

The French judgment having been delivered in June of 1937, on October 6, 1938, the bankruptcy notice now in question was issued, and the application to set it aside was based on two arguments, the second of which was that upon the merits the debtor had a good set-off or counterclaim. That was negatived and it has not been referred to before us.

The first of the arguments, which is the one with which we have to deal, raises a question of importance but, in my opinion, a question presenting no real difficulty, under the Foreign Judgments (Reciprocal Enforcement) Act, 1933. Putting it quite shortly, the argument is that under that Act the only relief which the holder of a foreign judgment registered under the Act can obtain is relief by way of execution, whether execution strictly so-called or execution in a looser sense such as equitable execution by way of receivership or garnishee proceedings—neither of which, of course, are in strictness execution at all. The Act of 1933 is the last of a series of Acts dealing with judgments which, for the purposes of the Courts of this country, are foreign judgments: whereas the earlier Acts dealt with judgments in Courts of other parts of the United Kingdom and the British Dominions, the present Act is the first Act which introduces the system of registration in respect of judgments of the Courts of countries which are not part of His Majesty's Dominions.

Before I come to look at the Act of 1933, I will say a word about the earlier legislation. The first Act to which attention is called is the Judgments (Extension) Act of 1868. That was an Act the object of which was to make judgments obtained in certain Courts in England, Scotland and Ireland effectual in other parts of the United Kingdom. It did so by means of a scheme of registration of judgments. Sect. 1 deals with the question of registration of English and Irish judgments in Dublin and Westminster, and s. 3 with the question of registration of decreets of the Court of Session at Westminster and Dublin. I need only refer to s. 3, because s. 1 is to the same effect mutatis mutandis. Sect. 3 provides that the certificate of judgment "shall from the date of such "registration be of the same force and effect as a judgment "obtained or entered up in the court in which it is so "registered." Then s. 4, with regard to all judgments registered under the Act, provided that the Courts in the three countries "shall have and exercise the same control and "jurisdiction over any judgment or decreet, and over any "certificate of such judgment or decreet, registered under "this Act in such Courts respectively, as they now have and "exercise over any judgment or decreet in their own courts, "but in so far only as relates to execution under this Act." It has been held in cases binding upon this Court that, notwithstanding the generality of the words in s. 3, "all proceedings "shall and may be had and taken," the concluding words of s. 4, namely "in so far only as relates to execution under this Act," impose a limitation upon the effect of registration by limiting that effect to execution, although not to execution strictly so-called, because it has been held to extend also to the case of receivership by way of equitable execution; but it was held that those limiting words were sufficient to exclude from the operation of the Act and from the effect of registration a bankruptcy notice and also a judgment summons under the Debtors Act, 1869 (32 & 33 Vict. c. 62)—that was the earlier of the two decisions cited to us. The reason why that view was taken in those cases was that the limiting words at the end of s. 4 were sufficient to exclude the bankruptcy notice and the summons under the Debtors Act. I need not refer to those cases beyond giving the references to them. They are *In re Watson* (1) and *In re a Bankruptcy Notice.* (2) Before I leave that Act, there is another matter with regard to it which I must mention. Of course, apart from statute, the only way of enforcing the judgment of a foreign Court (and in the word "foreign" I include Courts other than the Courts of England, and therefore I include Scotch and Irish and Dominion Courts) was by action, and various defences could be set up to an action of that kind. The Act of 1868 did not take away from the holder of a foreign judgment his right to start proceedings in the Courts of this country to enforce the judgment, proceedings initiated by writ in the usual way;

(1) [1893] 1 Q. B. 21. (2) [1898] 1 Q. B. 383.

and, if he had taken such proceedings in the case, let me say, of a Scotch decreet and had obtained judgment in them, there was nothing to prevent him commencing his bankruptcy proceedings on the basis of the judgment so obtained. The only effect of the authorities to which I have referred is that mere registration does not give the right to start bankruptcy proceedings by way of bankruptcy notice or otherwise. In order to do that under that Act the creditor would have to sue upon the judgment and obtain a judgment thereon. The Act did contain a provision in s. 6 giving the Court a discretion in the matter of the costs of an action brought to enforce any judgment or decreet which could be registered under the Act. As Stirling L.J. pointed out in one of the cases, the object was to discourage the old method of enforcing foreign judgments by suit in this country and encourage the holders of such judgments or decreets to avail themselves of the machinery of registration. Nevertheless, as I have said, for the purpose of bankruptcy proceedings it still remained possible under that Act for the bankruptcy machinery to be set in motion in the way I have mentioned.

The next Act is an Act of 1920, the Administration of Justice Act, which in s. 9 and the following sections contains provisions for the enforcement in the United Kingdom of judgments obtained in superior Courts in British Dominions. The only matter which it is necessary to mention with regard to s. 9 is that, although the actual arrangement of the relevant provisions setting out the effect of registration is somewhat different from that contained in the Act of 1868, the language is clearly borrowed from that Act; and (what for the present purpose is most important) it contains the same limitation upon the effect of registration, limiting it to execution, as was contained in s. 4 of the Judgments (Extension) Act, 1868. The Legislature in 1920 must be taken to have passed the Act of 1920 knowing how the Act of 1868 had been construed by the Courts, and, accordingly, when it adopts the same words, "in so far only as relates to execution," it must be taken to have adopted them in the light of those authorities. Similarly, under the Act of 1920 there is no prohibition against the enforcement of a judgment to which that Act applies by action in the old way, although there is a similar provision with regard to costs. Accordingly, just as under the Act of 1868, so under the Act of 1920 bankruptcy proceedings were still open to the holder of a judgment covered by that Act if he chose to start proceedings upon the judgment, recover judgment here and then issue his bankruptcy notice.

Now we come to the Act which is immediately in question in this case, the Foreign Judgments (Reciprocal Enforcement) Act of 1933. That is confined to judgments given in the superior Courts of any foreign country where His Majesty is satisfied that reciprocity exists and where by Order in Council he directs the Act to apply to a foreign country. Such an Order has been made in the case of the Republic of France, and the present judgment falls within the Act. The Act differs from the Acts of 1868 and 1920 in two particularly striking matters. After providing for registration on application, s. 2, sub-s. 2, of the Act sets out the effect of registration. Many of the words and phrases used are an echo of and no doubt borrowed from the language of the Acts of 1868 and 1920. But the differences are particularly striking. Sect. 2, sub-s. 2, provides as follows: "Subject to the provisions of "this Act with respect to the setting aside of registration:— "(*a*) a registered judgment shall, for the purposes of execution, "be of the same force and effect; and (*b*) proceedings may be "taken on a registered judgment; and (*c*) the sum for which "a judgment is registered shall carry interest; and (*d*) the "registering court shall have the same control over the "execution of a registered judgment; as if the judgment "had been a judgment originally given in the registering "court and entered on the date of registration." Then there is a provision that execution is not to issue on the judgment so long as any party is in a position to make an application to set the registration aside. Comparing that language with that of ss. 3 and 4, for instance, of the Judgments (Extension) Act, 1868, it is to be noticed, firstly, that this section expressly gives to the registered judgment, for the purposes of execution, the same force and effect as if the judgment had originally been given in the registering Court. In the Act of 1868 no such express reference to execution is to be found. Then it is only para. (*b*) that uses the general word "proceedings," which was to be found in s. 3 of the Act of 1868. It will be remembered that the Act of 1868 provided that "all proceedings shall and may "be had and taken on such certificate." Para. (*b*) of sub-s. 2 of s. 2 of the Act of 1933 makes that provision, but makes it after (*a*), which deals expressly with one subject and one subject alone, to wit, execution. It was suggested that the word "proceedings" in (*b*) must be limited to proceedings by way of execution which are dealt with in (*a*), not executions in the restricted sense but in the broader sense which I have already mentioned. I am quite unable so to construe the language of those two paragraphs. They are dealing under separate lettering the one with execution alone and the other with proceedings generally. The other matter on this section to which attention must be called is that para. (*d*), which says that "the registering Court shall have the same control over "the execution of a registered judgment" (which is taken in substance from s. 4 of the Act of 1868), omits the very words in that section which were held in the cases to which I have referred to have a limiting effect—namely, "but in so far "only as relates to execution under this Act." The learned Deputy Registrar has construed the sub-section as though words to that effect were present. With all respect to him, in my opinion it is quite illegitimate to read anything of the kind into the language of this sub-section. The language taken by itself, in my opinion, quite clearly includes proceedings by way of bankruptcy proceedings initiated by a bankruptcy notice or otherwise. That is strongly confirmed by the second great point of difference between this Act and the earlier Acts to which I am now about to refer. That is this. Sect. 6 provides: "No proceedings for the recovery "of a sum payable under a foreign judgment, being a judgment "to which this part of this Act applies, other than proceedings "by way of registration of the judgment, shall be entertained "by any court in the United Kingdom." Whereas the earlier

C. A.
1938
A JUDGMENT DEBTOR, *In re.*
Sir Wilfrid Greene M.R.

legislation still left it open to the judgment creditor, under a possible penalty, it is true, as to costs, to sue in the old way on his Scotch, Irish or Dominion judgment, under the present Act s. 6 prohibits any such method of dealing with a foreign judgment if it is a judgment registrable under the Act ; in other words, where the judgment is registered under the Act, the only thing that the holder of such a judgment is entitled to do is to register it, and after registering it, of course, he obtains the rights which the Act expressly says shall follow upon registration. But, if the argument for the respondent were correct, it would produce this startling result, that it would not be open for the holder of a foreign judgment registrable under the Act ever to enforce that judgment in bankruptcy, and for this reason, that he cannot sue on it—s. 6 prevents him doing so—and the only thing he could do would be to register it ; and then s. 2, sub-s. 2, according to the respondent's argument, prohibits him from taking or does not enable him to take bankruptcy proceedings on the basis of the registered judgment. The result, therefore, would be that this Act would have placed the holders of foreign judgments, for the purpose of enforcing those judgments in bankruptcy, in a much worse position than they were in before. I should have said, of course, that s. 6 only applies to judgments for the recovery of a sum of money. It seems to me that s. 6 shows that Parliament was intending by this Act to provide that the only method of enforcing foreign judgments should be by registration. That being so, the holder of a registered judgment can do whatever s. 2 tells him that he can do. When I look at s. 2 and find clear language used which, according to its ordinary meaning, would cover a bankruptcy notice, I must decline to read into that language by implication limiting words which would cut down its effect, and cut down its effect with a result which, I venture to think, cannot possibly have been intended by the Legislature—namely, of depriving the holder of a foreign judgment of valuable rights with regard to its enforcement which he had previously possessed.

That being so, and that being the construction which

I place upon the relevant language of the Act, it is only necessary to refer to s. 1 of the Bankruptcy Act of 1914, which provides for the service of bankruptcy notices. It would, perhaps, have been more logical if I had referred to this at the beginning of my judgment rather than at the end. It provides in s. 1 (*g*) that a debtor commits an act of bankruptcy "If a creditor has obtained a final judgment or final "order against him for any amount, and, execution thereon "not having been stayed, has served on him in England, or, "by leave of the court, elsewhere, a bankruptcy notice under "this Act" and so on. It has not been suggested, and indeed could not be suggested, that those words "final judgment or final order" taken by themselves extend to anything save a judgment or order of a Court within the jurisdiction; that is to say, in England it would be a final judgment of an English Court. That that is the meaning of those words is, I think, beyond doubt; but the effect of the Act of 1933 as I have construed it is to place the foreign judgment, when registered for the purposes of the bankruptcy notice, in the same position as if it was a final judgment of an English Court. Therefore the fact that those words in the Bankruptcy Act, taken by themselves, would exclude such a judgment does not have the result of preventing a foreign judgment, when registered, from becoming the basis of a bankruptcy notice.

In the result the appeal must be allowed with costs here and below.

FINLAY L.J. I agree.

LUXMOORE L.J. I also agree.

Appeal allowed.

Solicitors for appellant: *Blount, Petre & Co.*
Solicitors for respondent: *Weldon & Edwards.*

P. J. B.

Considered. *In re* BRASSEY'S DEED OF APPOINTMENT [1951] 1 Ch. 351

Applied. *Re* BRASSEY'S DEED TRUSTS. [1951] 2 All E.R. 353.

C. A.

1938

Nov. 7, 8, 9, 10, 16, 17, 18, 21.

1939

March 6.

WESTMINSTER BANK, LIMITED *v.* ATTORNEY-GENERAL.

[1937. W. 3315.]

Revenue—Estate duty—Settled property—Accumulations fund—Policies—Annuities—Life interests—Aggregation—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 1; *s.* 2, *sub-s.* 1 (*d*).

In 1926 a settlor assigned to a bank, as trustee, life policies and investments on trust to accumulate the income of the investments for twenty-one years or during his life, whichever should be the shorter, thereafter to hold the settled property on trust to pay the income to such of a certain person's children, born during the settlor's life, as should attain, or being females marry under, the age of twenty-one years and, on the death of any such child after attaining a vested interest, to hold the capital and income of that child's share as the child should by will appoint and in default of appointment for the child's issue living at his or her death per stirpes.

In 1930, further property was settled on the trusts of the settlement of 1926, and was made subject also to life annuities in favour of named persons.

At the date of the settlor's death, in 1936, there were living five of the children, all born during his life, and all the annuitants.

By this summons the bank asked whether the estate duty payable on the settlor's death in respect of the moneys received by the bank under the policies included in the settlement of 1926, the corpus of the funds in both settlements (other than those moneys) and the accumulations during the settlor's life of income of those funds, was payable under s. 1 of the Finance Act, 1894 (1), on the principal values thereof respectively, or under s. 2, sub-s. 1 (*d*), of the Act (2), on the principal values of the annuities payable thereout and life interests therein arising on the settlor's death: and the bank asked also whether, in order to ascertain the rate of estate duty to be paid on the settlor's death, reversionary bonuses on the policies declared since the settlement of 1926 and accumulations of income during the settlor's life under both settlements (or, alternatively, the values of the annuities payable out of those bonuses and accumulations and of the life interests in them arising on the settlor's death), ought to be aggregated so as to form one estate with the other property passing on his death or to be treated as estates by themselves:—

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(1) Finance Act, 1894, s. 1, provides: "In the case of every "person dying after the com- "mencement of this Part of this "Act, there shall, save as herein- "after expressly provided, be "levied and paid, upon the princi- "pal value ascertained as herein- "after provided of all property, "real or personal, settled or not "settled, which passes on the "death of such person a duty, "called 'Estate duty,' at the "graduated rates herein-after men- "tioned. . . . ."

(2) Sect. 2, sub-s. 1, provides: "Property passing on the death "of the deceased shall be deemed "to include the property following, "that is to say:—(*a*) Property of "which the deceased was at the "time of his death competent to "dispose; (*b*) Property in which "the deceased or any other person "had an interest ceasing on the "death of the deceased, to the "extent to which a benefit accrues "or arises by the cesser of such "interest; but exclusive of pro- "perty the interest in which of "the deceased or other person was "only an interest as holder of an "office, or recipient of the benefits "of a charity, or as a corporation "sole."

. . . .

Held, (1.) that estate duty in respect of the policy moneys was payable under s. 2, sub-s. 1 (*d*), that it was payable under s. 1 in respect of the corpus of the funds (other than the proceeds of policies) included in the settlements and in respect of the accumulations of income included therein, and that it was payable under s. 2, sub-s. 1 (*d*), in respect of so much of the proceeds of the policies as was equal to the value of the vested and contingent life interests arising therein on the settlor's death;

(2.) that, for the purposes of ascertaining the rate of estate duty, the assessable values of all the properties so passing were to be aggregated with the other property passing on his death.

In re Hodson's Settlement (ante p. 343) followed.

Decision of Farwell J. varied.

APPEAL from a decision of Farwell J.

By a settlement dated January 27, 1926, and made between Sir Frederick Macmillan (hereinafter mostly called "the settlor") of the one part and Westminster Bank, Ld. (hereinafter called "the bank") of the other part, the settlor assigned to the bank certain policies of assurance on his life and certain investments on trusts to accumulate the income of the investments for twenty-one years from the date of the settlement or during the settlor's lifetime, whichever should be the shorter. From and after the determination of the period for accumulation the bank was to hold the trust fund (i.e., all the property settled) on trust to pay the income to such of the children of Mrs. Elizabeth van der Goes born during the settlor's life as should attain, or, if females, marry under, the age of twenty-one years during their lives in equal shares, and after

"(*d*) Any annuity or other "interest purchased or provided "by the deceased, either by him-"self alone or in concert or by "arrangement with any other "person, to the extent of the "beneficial interest accruing or "arising by survivorship or other-"wise on the death of the "deceased."

the death of any child who attained a vested interest, as to both capital and income of that child's share as that child should by will or codicil appoint, and in default of appointment for that child's issue living at his or her death per stirpes.

By a further settlement dated October 23, 1930, supplemental to that of 1926, the settlor settled further property on the trusts of the settlement of 1926 and subject also, on the settlor's death, to certain life annuities in favour of persons therein named.

The settlor died on June 1, 1936. There were then, and at the date of this summons, five children of Mrs. van der Goes living, all born during the settlor's life: and all of the annuitants were also then living.

On the settlor's death the Inland Revenue claimed estate duty under s. 1 of the Finance Act, 1894, in respect of the principal value of the whole of the trust property subject to the two settlements (other than the policy moneys), and of the accumulations thereof, as property passing on his death. The Inland Revenue claimed estate duty also under s. 2, sub-s. 1 (*d*), of the Act in respect of the principal value of the life interest of Elizabeth van der Goes' children, under the settlement of 1926, in the policy moneys, as property deemed to pass on the settlor's death. They claimed also that, to determine the rate of estate duty to be paid on the settlor's death the trust property (other than the policy moneys), the accumulations thereof, and the principal value of the same life interests in the policy moneys, ought to be aggregated so as to form one estate with the other property passing on the settlor's death.

The bank, as trustee of the settlements, admitted that it was accountable for estate duty properly payable on the settlor's death in respect of the property comprised in the settlements and was willing to deliver an account of and pay duty properly payable: but it contended, first, that duty was not payable under s. 1 of the Finance Act, 1894, but that any duty payable was payable under s. 2, sub-s. 1 (*d*), of the Act, on the principal values of the annuities payable out of, and the life interests in the property subject to, the settlements, arising on the settlor's death, in the case of moneys received under the policies, the corpus of the funds (other than those moneys) included in the settlements, and the accumulations of income of the funds made during the settlor's life; and the bank contended, secondly, that in order to ascertain the rate of estate duty to be paid on the settlor's death, whether under s. 1 or s. 2, sub-s. 1 (*d*), of the Finance Act, 1894, reversionary bonuses on the policies declared since the date of the settlement of January 27, 1926, or received in respect of the period since that date, and accumulations of income made during the settlor's life under both of the settlements (or, alternatively the values of the annuities payable out of, and the life interests arising on the settlor's death in, those reversionary bonuses and accumulations) ought not to be aggregated so as to form one estate passing on the settlor's death, but ought to be treated as estates by themselves, on the ground that they represented property in which the settlor never had an interest within the meaning of s. 4 of the Finance Act, 1894 (dealing with the aggregation of property to form one estate for the purpose of estate duty).

On October 13, 1937, the bank issued this summons to determine (inter alia) under s. 3 of the Administration of Justice (Miscellaneous Provisions) Act, 1933 (providing for the summary determination by the High Court of liability as to death duties): (1.) Whether, on the true construction of the settlements and of the Finance Act, 1894, and amending Acts, and in the events which had happened, the estate duty payable on the settlor's death in respect of (*a*) the moneys received by the bank on the settlor's death under the policies included in the settlement of January 27, 1926, (*b*) the corpus of the funds, other than moneys received under the policies, in both settlements, and (*c*) the accumulations of income of those funds made during the settlor's life, was payable under s. 1 of the Finance Act, 1894, on the principal values thereof respectively, or under s. 2, sub-s. 1 (*d*), of the Act, on the principal values of the annuities payable thereout and life interests therein which arose on the settlor's death; (2.) whether in order to ascertain the rate of estate duty to be paid on the settlor's death, the following property (or, alternatively, the values of the annuities payable thereout and life interests therein arising on the settlor's death) ought to be aggregated so as to form one estate with the other property passing on the settlor's death, or to be treated as estates by themselves; (*a*) reversionary bonuses on the policies declared since the date of the settlement of January 27, 1926, (*b*) accumulations of income made during the settlor's life under that settlement and under the settlement of 1930; (3.) the extent of the bank's liability for estate duty.

Farwell J. held that estate duty was payable under s. 2, sub-s. 1 (*d*), and that for the purpose of ascertaining the rate of estate duty to be paid there ought not to be any aggregation, but that the items in question ought to be treated as estates by themselves.

The Crown appealed. The appeal was argued on November 7, 8, 9, 10, 16, 17, 18 and 21, 1938.

At the conclusion of the argument in *In re Hodson's Settlement* (1) on the question whether the accumulations fund in that case passed on the settlor's death under s. 1, s. 2, sub-s. 1 (*b*), or s. 2, sub-s. 1 (*d*), the same question was argued in this case.

J. H. Stamp for the Attorney-General. The facts here are similar to those in *In re Hodson's Settlement* (1), except that part of the property settled here was policies of insurance on the settlor's life. As regards the original settlement fund (other than the policies) and the accumulations fund the arguments already advanced in *In re Hodson's Settlement* (1) apply. As regards the policy moneys it is admitted that this passed under s. 2, sub-s. 1 (*d*), on the settlor's death.

L. W. Byrne for the respondents. There is no desire to add anything to the legal arguments in *In re Hodson's Settlement* (1) and the arguments for the respondents on this part of the case are adopted.

1938. Nov. 18. *J. H. Stamp* for the Attorney-General.

(1) Ante, p. 343.

The fund is on trusts for accumulation substantially in the same form, and on the question of aggregation the same arguments apply as in *In re Hodson's Settlement* (1), but in addition to the fund there are also some fully paid policies of insurance, and moneys, including bonuses already accruing when the settlement was made. The question as to aggregation as to policy moneys raises the question whether it makes any difference that the policy moneys (including bonus) admittedly passed on the settlor's death under s. 2, sub-s. 1 (*d*). This question also has been argued in *In re Hodson's Settlement.* (1) The question is whether the settlor had an interest in this part of the fund, and whether the bonuses were property in which he had an interest. It is quite clear that what had been purchased or provided by the deceased was the policy moneys. It is impossible to say that a man who owns a fully paid policy of insurance has no interest in the moneys under that policy.

L. W. Byrne for the respondents. The answer to the question whether the deceased had an interest or not depends on the nature of the property deemed to pass on which duty is claimed. If it was a chose in action, it cannot be contended that he never had an interest in it. Here, however, the property on which duty is claimed is the beneficial interest accruing or arising on the death of the deceased in the moneys paid under the policies. The deceased never had an interest in these moneys within the meaning of s. 4, because they are property which came into existence only after his death.

Cur. adv. vult.

1939. Mar. 6. CLAUSON L.J. read the judgment of the Court (Sir Wilfrid Greene M.R., Scott and Clauson L.JJ.).

In the case of *Westminster Bank* v. *Attorney-General,* the relevant facts are as follows: By a settlement of January 27, 1926, Sir Frederick Macmillan, who died on June 1, 1936, settled certain policies on his life and certain investments upon trusts under which the income from the investments was to be accumulated for a period of twenty-one years from the date of the settlement or during Sir Frederick's lifetime, whichever should be shorter. In the event which has happened of Sir Frederick dying within the twenty-one-year period, the policies, the investments, and the accumulations fund were to be held in trust to pay the income to such of the children of Mrs. van der Goes born in the lifetime of Sir Frederick as should attain twenty-one years of age or marry under that age for their respective lives, and each such child was given a general testamentary power of appointment over the capital of his or her share, and in default of appointment the capital was to belong to the issue of such child living at his or her death per stirpes. By a later settlement of October 23, 1930, Sir Frederick settled a further fund upon corresponding trusts, burdened, however, with certain life annuities arising upon Sir Frederick's death in favour of certain named persons. There were at Sir Frederick's death several children of Mrs. van der Goes in existence, some of whom had, and some had not, attained vested life interests : all the annuitants survived him. On his death the policies became payable together with various bonuses, some of which had been declared as reversionary bonuses before the date of the settlement, and some of which had been so declared after the date of the settlement.

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(1) Ante, p. 343.

Farwell J., treating this case as covered by his decision in *In re Hodson's Settlement*, held that there was no passing under s. 1 on Sir Frederick's death, of either the policy moneys, the originally settled funds, or the accumulations fund. In our judgment the reasons which led us to hold that the accumulations fund, in the case of *In re Hodson's Settlement* (1), passed under s. 1 on the settlor's death, must lead to the same conclusion as regards the originally settled funds and the accumulated funds in question in this case, setting aside for the moment any question as regards the policies. Previously to her death, the children of Mrs. van der Goes had an interest in the income of these funds, since they had a right to have

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(1) Ante, p. 343.

C. A.
1939
WESTMINSTER BANK, LD. v. ATTORNEY-GENERAL.

that income accumulated so as to provide an accumulated fund the fruit of which would come to them, and the children of those children had a corresponding right to have it accumulated so as to provide an accumulated fund the capital of which would, in default of appointment to the contrary, come to them: but a clear change in the beneficial possession of the property as a whole took place on Sir Frederick's death. Not only did the life interests of the children of Mrs. van der Goes become interests in possession, but the interests of the next generation (children of the children of Mrs. van der Goes) were changed in that the accruing income was no longer to be rolled up for their benefit as an addition to capital, but the right to this income passed to their respective parents for their respective lives. Accordingly, in our judgment, estate duty became payable on Sir Frederick's death on these various funds under s. 1. The reasons which we have given for aggregation in the previous case of *In re Hodson's Settlement* (1) are applicable to these funds, omitting for the moment the question of aggregation in respect of the policy moneys.

In regard to the policy moneys the Crown does not now claim that there was any "passing" under s. 1. The Crown is content in regard to them to accept as correct the decision of Farwell J. embodied in his order, and, accordingly, to accept the view that duty is payable in respect of the policy moneys under s. 2, sub-s. 1 (*d*), upon the principal value of the life interests which arise upon the death of Sir Frederick in the policy moneys. The Crown, however, claims that the decision of Farwell J. against aggregation is wrong, not only in so far as relates to the aggregation of the investments and the accumulations (on which point, as we have already said, our decision in the case of *In re Hodson's Settlement* (1) covers the matter) but also in so far as relates to the aggregation of that which is deemed in respect of the policy moneys to pass on the death of Sir Frederick under s. 2, sub-s. 1 (*d*), and this is the only question arising in the present case which is not directly covered by our decision in the case of *In re Hodson's Settlement*. (1)

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(1) Ante, p. 343.

The first step is to ascertain with precision what it is that is deemed to pass on the death of Sir Frederick in respect of the policy moneys by reason of the operation of s. 2, sub-s. 1 (*d*). The answer, in the words of the sub-section, is " the interest "provided by the deceased to the extent of the beneficial "interest accruing or arising on the death of the deceased." The interest provided by the deceased is the amount of the policy moneys including the bonuses. It is not, however, the whole of that sum which is deemed to pass; that sum is deemed to pass only to the extent of the beneficial interest accruing or arising on the death of the deceased. In the present case the extent of the beneficial interest so arising is commensurate with the life interests which spring into being on the death of Sir Frederick, that is to say the life interests, whether vested or contingent, on attaining twenty-one or marrying of the five children of Mrs. van der Goes living at the testator's death. It follows that that which passes in respect of the policy moneys is so much thereof as is equivalent to the value of those life interests therein.

The next step is to apply s. 4 to the case. From that section it follows that the last mentioned value is to be aggregated with other property passing on the death, subject to the proviso that it will not be aggregated if it can be predicated of it that Sir Frederick never had an interest in it. In the reasons which we gave for our judgment in *In re Hodson's Settlement* (1) we indicated our view that it is not possible to predicate of policy moneys paid in respect of a policy at one time belonging to A.B. that A.B. never had any interest in them. Since the conclusion of the arguments in the present case the point has been concluded by the decision of the House of Lords in *Tennant* v. *Lord Advocate.* (2) It follows that it cannot be predicated of this sum, forming, as it does, a part of the policy moneys paid upon policies belonging to and settled by Sir Frederick, that he never had any interest in it. It results that in our view, the Crown's claim that this sum should be aggregated is correct.

Farwell J. appears to have reached the contrary conclusion

(1) Ante, p. 343.

(2) [1939] A. C. 207.

by holding that the beneficial life interests were that which is to be deemed to pass: but in our judgment, the correct construction of the paragraph is that the " annuity or other "interest purchased or provided " is that which is deemed to pass though only to the limited extent indicated; and where the "interest provided" is provided in the shape of policy moneys, arising from a policy formerly belonging to and settled by the settlor, it is not possible in our view to predicate that that interest or any part of it is property " in which "the deceased never had an interest."

The order of Farwell J. must, therefore, be discharged, save in so far as it declares that estate duty is payable upon the death of Sir Frederick Macmillan in respect of the moneys received by the plaintiff upon the death of Sir Frederick under the policies included in the settlement of 1926 under s. 2, sub-s. 1 (*d*), of the Act of 1894, upon the principal value of the life interests therein which arose upon the said death; and it must be declared that estate duty is payable upon the said death under s. 1 of the said Act in respect of the residue of the property comprised in the settlement of 1926, and in respect of the property comprised in the settlement of 1930; and that there is to be aggregation with other property passing upon the said death of (*a*) the principal value of the said life interests, and (*b*) the said residue of the property comprised in the settlement of 1926, and (*c*) the property comprised in the settlement of 1930. The Attorney-General's costs of the summons and of this appeal must be paid by the plaintiffs. Leave to appeal to the House of Lords will be given if desired.

Appeal allowed.
Leave to appeal to the House of Lords.

Solicitors: *Solicitor of Inland Revenue; Broad & Son.*

K. R. A. H.

C. A.

1939

Jan. 12, 13;
March 6.

SHENTON *v.* TYLER.

[1938. S. 1375.]

Procedure—Interrogatories—Alleged secret trust—Communication by husband to wife—Death of husband—Communication not privileged—Evidence Act, 1843 (6 & 7 *Vict. c.* 85)*—Evidence Act,* 1851 (14 & 15 *Vict. c.* 99), *ss.* 2, 3*—Evidence Amendment Act,* 1853 (16 & 17 *Vict. c.* 83), *ss.* 1, 2, 3*—Criminal Evidence Act,* 1898 (61 & 62 *Vict. c.* 36), *s.* 1 (*d*).

There has never been a rule at common law that communications between husband and wife during the marriage are privileged.

Sect. 3 of the Evidence Amendment Act, 1853, provides as follows: "No husband shall be compellable to disclose any "communication made to him by his wife during the marriage, "and no wife shall be compellable to disclose any communication "made to her by her husband during the marriage":—

Held, that widowers and widows do not come within the scope of the section.

Decision of Simonds J. (ante p. 271) reversed.

APPEAL from a decision of Simonds J. (1)

A procedure summons was taken out by the appellant, Mrs. Florence Annie Shenton, asking leave to put certain interrogatories to the respondent, Mrs. Edith Lilian Tyler.

By his will, dated October 4, 1932, the respondent's husband, Edmund Deeble Tyler, appointed the respondent, Henry Peters Tyler, and Frank Dixon to be his executors, and he devised and bequeathed all his residuary estate to the respondent absolutely. He died on January 6, 1937.

The respondent made payments of 2*l.* per week to the appellant from the date of her husband's death until March 8, 1937, when she discontinued them. The appellant then brought an action against the respondent, claiming a declaration that the testator had, in his lifetime, created a secret trust in her favour by communicating to the respondent his wish that she should pay to the appellant the weekly sum of 2*l.* during the appellant's lifetime; that the respondent promised to do so; that acting on the faith of such promise, the testator left the whole of his residuary estate to the respondent; and that the respondent had thereby become bound to pay the weekly sum of 2*l.* to the appellant during her lifetime. The respondent denied that any secret trust as alleged had ever been created, and stated that any money which she had paid to the appellant was paid voluntarily and by way of alms-giving, and not under any obligation.

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(1) Ante p. 271.

The appellant then sought to interrogate the respondent as to the alleged request and promise. The respondent objected to answer any interrogatories on the ground that they related to matters which, she claimed, had passed between herself and her husband, and were therefore absolutely privileged from disclosure.

Simonds J. held that the common law rule of evidence was that all communications between a husband and wife made during the marriage were privileged, and that that rule extended to a widow after the death of her husband.

The plaintiff appealed. The appeal was heard on January 12 and 13, 1939.

J. P. Eddy K.C. and *Roger Turnbull* for the appellant. The interrogatories as to a secret trust ought to be answered by the defendant. The principle on which equity gives effect to a secret trust is that the person to whom property is bequeathed subject to a secret trust must not take advantage of his own fraud. If there is in fact no secret trust in this case, no confidence between husband and wife will be violated by the respondent's saying so. If the contrary is the case, the Court, by disallowing these interrogatories, will be lending itself to the commission of a fraud, and that it cannot do. Communications between husband and wife are not privileged where there is a prima facie case of fraud.

The general principles in regard to the competency and compellability of a wife to give evidence are stated in Lush on Husband and Wife, 4th ed., p. 598, and Taylor on Evidence, 2nd ed., vol. i., p. 572; vol. ii., p. 851. It there appears that evidence in regard to communications between husband

and wife is excluded on the ground of public policy. The old common law rule was construed to mean that whatever became known during marriage by communication between husband and wife was not a matter that either of them could be compelled to divulge even when the marriage is at an end: see *Monroe* v. *Twisleton* (1); *Beveridge* v. *Minter* (2); *Doker* v. *Hasler* (3), and *O'Connor* v. *Marjoribanks*. (4) The common law rule rested on the trust and confidence reposed by husband and wife in each other. But no such principle applies here, because any communication in regard to a secret trust would be a matter not intended to be kept secret after the death of the person creating it.

[SIR WILFRID GREENE M.R. There were really two separate rules. The first was that a husband could not give evidence against his wife and vice versa, and the second was a rule of privilege as regards communications between husband and wife.]

It is the rule of privilege alone that is material here.

[LUXMOORE L.J. referred to *Tharp* v. *Tharp*. (5)]

The grounds on which a secret trust is enforced appear from *McCormick* v. *Grogan* (6) and *Blackwell* v. *Blackwell*. (7) The obligation to perform it fastens on the conscience of the person to whom property has been bequeathed subject to a secret trust. It follows that the Court will not in this case allow the wife's claim to privilege, seeing that she seeks to use it to escape her obligation.

The rules of evidence have been the matter of successive statutes. The Evidence Act, 1843, made the parties interested in an action and the husband and wife joint parties competent to give evidence, and the Evidence Act, 1851, s. 2, made the parties competent and compellable to give evidence, except persons charged with criminal offences.

This left a gap, as was decided in *Stapleton* v. *Crofts* (8), and the Evidence Amendment Act, 1853, was passed to fill it. Sect. 1 provided that the husband or wife of a party was competent or compellable to give evidence in civil proceedings, but s. 3 provided the rule of privilege as to communications passing between husband and wife. The rule as stated there is very limited. It does not extend beyond the continuance of the marriage, and therefore it does not apply to this case. Simonds J. held, however, that there was a common law rule which was absolute, that neither the husband or wife was compellable to give evidence as to any communication passing between them, and that this applied after one of the spouses was dead. He based this doctrine on *Monroe* v. *Twisleton* (1); *Doker* v. *Hasler* (2); and *O'Connor* v. *Marjoribanks.* (3) But in reality no such rule of privilege is laid down in any of those cases. They related to the competency of the wife to give evidence. In the period before the Evidence Act already referred to a party could not give evidence on his own behalf, and that rule extended to the spouse of the party, who could not give evidence against her husband or his wife. The three cases mentioned above are merely examples of that rule. There never was a rule that, where the husband was not a party interested, the wife was not competent to give evidence. That was made clear by *Stapleton* v. *Crofts.* (4) The true position is that, since the passing of the Act of 1853, the husband or wife of a party is competent and compellable to give evidence, but not as to communications passing between them during the continuance of the marriage. That is the combined effect of ss. 1 and 3, which are interlinked. Sect. 3 is not of more general application, but in any case it has no application here, as the privilege is limited to the period during which the marriage continues, and does not apply in the case of a widow. If any privilege existed at common law, it is remarkable that there is no authority establishing it, and the burden of proving its existence rests on the respondent.

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(1) (1802) Peake's Add. Cas. 219.
(2) (1824) 1 Car. & P. 435.
(3) (1824) Ry. & Moo. 198.
(4) (1842) 4 Man. & G. 435.
(5) [1916] 1 Ch. 142.
(6) (1869) L. R. 4 H. L. 82.
(7) [1929] A. C. 318.
(8) (1852) 18 Q. B. 367; 21 L. J. (Q. B.) 247.

Charles Harman K.C. and *G. D. Johnston* for the respondent. Simonds J. was right in holding that from time immemorial a wife had the right to say that the confidences between her husband and herself should not be revealed, and that that right

(1) Peake's Add. Cas. 219.
(2) Ry. & Moo. 198.
(3) 4 Man. & G. 435.
(4) 18 Q. B. 367; 21 L. J. (Q. B.) 247.

C. A.
1939
SHENTON
v.
TYLER.

still existed. The other side suggest that no such privilege ever existed at common law, and that it only exists now to the limited extent provided by s. 3 of the Evidence Amendment Act, 1853. If this contention were correct, it is remarkable that the text-books all assume the existence of the privilege at common law. Of course, before the date when a party to a suit or a person interested in a suit could give evidence, the case could arise very rarely; but none of the three cases relied on by Simonds J. of *Monroe* v. *Twisleton* (1); *Doker* v. *Hasler* (2); *and O'Connor* v. *Marjoribanks* (3) dealt with a married woman during the continuance of the marriage, and in none of these cases therefore was she incompetent to give evidence. It is true that in *Monroe* v. *Twisleton* (1) the matter was stated as one of competence of the wife to give evidence after a divorce, but it was really being dealt with as a matter of public policy: see also Taylor on Evidence, 12th ed., vol. i., p. 572. The two matters of privilege and inadmissibility have been mixed up. The privilege stated in the Act of 1853 is based on the old rule that a widow or divorced person was competent to go into the witness-box, but need not divulge a marital confidence. Thus in *Wennhak* v. *Morgan* (4) it was held that it was not publication of a libel for the husband to disclose it to his wife.

It is not here a matter of answering one or two interrogatories, for if the wife once waived her privilege she could be cross-examined as to matters passing between her and her husband during their whole married life. Her attitude here is that the common law protects her, and, if it does not, that the Act of 1853 does so, and not the less so because she is a widow. All the widow is doing here is to say to the appellant: "You can "prove your case if you can, but not out of my mouth." It is paying too high for the discovery of truth to compel the revelation of the confidences of married life.

On the question of merits it is important to see the exact case the appellant seeks to make. Originally she alleged that the secret trust was created during the life of the husband

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(1) Peake's Add. Cas. 219.
(2) Ry. & Moo. 198.
(3) 4 Man. & G. 435.
(4) (1888) 20 Q. B. D. 635.

and that until discovery of documents she could give no fuller or better particulars. Then, after discovery of documents was completed, she changed her ground and said she could not give particulars till after discovery, and the interrogatories were then framed to try to extract the information she did not possess. Really, therefore, the appellant brought the action without anything to go on, and her accusation against the respondent was unsupported by any particulars whatever. Then, when the interrogatories are examined, it is seen that they are of a roving nature, extending over the whole married life. They are wide enough to cover communications resulting in no secret trust, as if the husband asked the wife to look after the appellant after his death, and she said she would. It is not every promise that creates a legal obligation. It would be against public policy to compel the respondent to answer these interrogatories, and she ought not to be ordered to do so.

[They also cited *Aveson* v. *Lord Kinnaird*. (1)]

Eddy K.C. in reply. If ever there was any such privilege as is claimed here, there is nothing to show what was its scope. The position between husband and wife is very well dealt with by Viscount Cave in *Edwards* v. *Porter*. (2)

Cur. adv. vult.

1939. March 6. Sir Wilfrid Greene M.R. This appeal raises a question of general importance. The appellant, plaintiff in the action, seeks to administer to the respondent certain interrogatories designed to obtain from her admissions to the effect that a secret trust in favour of the appellant was imposed upon the respondent by her late husband before his death; and that the respondent accepted such trust. The respondent objected to the interrogatories, on the ground that she was not bound to answer questions relating to a communication made to her by her husband; and Simonds J. upheld the objection. The appeal, therefore, raises questions as to the nature and extent of the privilege which applies to communications between spouses; and whether or not the privilege persists after the

(1) (1805) 6 East, 188.

(2) [1925] A. C. 1, 8–9.

marriage has come to an end. In preparing this judgment, I have enjoyed the benefit of the researches of my brother Luxmoore, the extent of which appears in his judgment about to be delivered.

In considering the questions which fall for decision, it is necessary at the outset to distinguish four rules of evidence. The first is the rule which existed at common law, that neither a party nor the spouse of a party was a competent witness on behalf of that party. This rule related to the competence of the witness, and was not a rule of privilege. The second is the rule which existed at common law that a party was not a compellable witness against himself—I say compellable, although it may be that this was also a rule of competence and not of privilege, a question which for present purposes need not be discussed. The third rule is the rule that existed at common law that a spouse was not a competent witness against his or her spouse. I say competent advisedly, since the English authorities appear to have excluded the evidence in such a case on the ground that the witness was incompetent, and not on that of privilege: see, for example, *Barker* v. *Dixie* (1); *Davis* v. *Dinwoody*. (2) See also the Second Report of the Common Law Commission, 1853, pp. 12 and 13, where the rules relating to the competence of spouses are discussed. The reasons given for this third rule were various. For example, Lord Hardwicke, in *Barker* v. *Dixie* (1), said that this rule, and the rule forbidding one spouse to give evidence in favour of the other, existed in order " to preserve "the peace of families." In Buller's Nisi Prius, 286 (cited arguendo in *Davis* v. *Dinwoody* (2)), the reason for the rule is said to lie in " the legal policy of marriage " ; while the rule forbidding one spouse to give evidence in favour of the other is said to exist " because their interests are absolutely the same." Lord Kenyon C.J. in *Davis* v. *Dinwoody* (2) said that, quite apart from interest, the ground of both rules was the presumption of bias. Which of these and other reasons from time to time given is the least unsatisfactory (a question which has been much debated) I do not pause to inquire.

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(1) (1736) Cases t. Hardwicke, 264.

(2) (1792) 4 T. R. 678.

It is to be observed that this third rule only came into operation in the case where the other spouse was a party. Like the first rule, it was a rule affecting competence, and extended to the whole of the evidence which the witness might be able to give, whether it related to marital communications or not.

In stating the common law rules with which I have dealt, I have not referred to any of the recognized exceptions, since they are not relevant to the matter with which we have to deal. Of the three rules above mentioned, the first and third were apparently observed in Courts of equity as well as in Courts of common law. But the second rule was not observed in Courts of equity, since in those Courts it was from earliest times permissible to interrogate the opposite party.

The fourth rule, which is the rule now in question, is a rule not of competence or admissibility, but of privilege which protects marital communications as such. The question whether or not this privilege existed at common law, or is the creature of statute, lies at the heart of the present controversy. Whatever the true answer to it may be, the rule has nothing to do with the fact that one of the spouses may be a party to the proceedings. The privilege exists equally whether the witness or his or her spouse is or is not a party to the proceedings. Indeed, one of the reasons for the obscurity which surrounds the crucial question is that only in exceptional cases could evidence of a communication between husband and wife be admissible in proceedings to which neither was a party; and the result was that in the great majority of cases evidence of such communications was effectively excluded by the rules as to the competence of spouses already discussed.

Before I come to consider the question whether or not any such privilege existed at common law, it will be convenient to summarize the legislative enactments which have dealt with all four rules, so far as they are relevant to the present question.

The Evidence Act, 1843, commonly known as "Lord Denman's Act," removed the incompetence of witnesses on the ground of interest which had previously existed; but it contained a proviso preserving the incompetence of parties and their husbands or wives. The Evidence Act, 1851, commonly known as "Lord Brougham's Act," repealed this proviso save as regards the husbands or wives of parties; and made parties themselves both competent and compellable witnesses, except in certain cases, particularly criminal matters. It was decided in *Stapleton* v. *Crofts* (1) that this Act did not render a wife competent to give evidence on behalf of her husband, who was defendant in the action.

It was at this point in the legislative history that the Common Law Commissioners presented their Second Report, in which, after examining the reasons for the rule making husbands and wives incompetent to give evidence either for or against one another, they recommended (at p. 13) that this rule should be abrogated "but that all communications between "them should be held to be privileged." The reason given for the latter recommendation is as follows: "The question how "far the communications of married persons inter se should be "matter of testimony in courts of justice, stands on very "different ground. So much of the happiness of human life "may fairly be said to depend on the inviolability of domestic "confidence, that the alarm and unhappiness occasioned to "society by invading its sanctity, and compelling the public "disclosure of confidential communications between husband "and wife, would be a far greater evil than the disadvantage "which may occasionally arise from the loss of the light which "such revelations might throw on questions in dispute."

This recommendation was accepted by the Legislature and embodied in the Evidence Amendment Act, 1853, also known as "Lord Brougham's Act." Sect. 1 of that Act made the husbands and wives of parties competent and compellable witnesses except in criminal proceedings or proceedings instituted in consequence of adultery. Sect. 3 of the Act provides as follows: "No husband shall be compellable to "disclose any communication made to him by his wife during "the marriage, and no wife shall be compellable to disclose "any communication made to her by her husband during the "marriage." The statutory privilege, therefore, extends only to communications made to the witness, and does not protect those made by the witness.

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(1) 18 Q. B. 367.

I point out here, in passing, two matters which will be found later to be of importance. The first is that the Common Law Commissioners make no reference to any then existing rule of privilege relating to communication between husband and wife as such. The second is that s. 3 of the Act of 1853, unlike s. 2 (which relates to criminal matters and adultery), is in form not a mere proviso upon or exception from s. 1, as it would naturally have been if the Legislature had conceived itself to be preserving an existing rule of law. It takes the form of an independent enactment of general application. It is not confined to cases where the witness or his or her spouse is a party, but extends to all cases. Moreover, the privilege is conferred upon the witness alone, with the result that the other spouse has no right to object to the disclosure of the communication.

I pass over the Evidence Further Amendment Act, 1869, and come to the Criminal Evidence Act, 1898. That Act made a person charged with an offence and his or her wife or husband competent witnesses for the defence; and s. 1 (*d*) provided that "Nothing in this Act shall make a husband "compellable to disclose any communication made to him by "his wife during the marriage, or a wife compellable to disclose "any communication made to her by her husband during the "marriage." It is natural to find this paragraph (unlike s. 3 of the Act of 1853) expressed in the form of a proviso. The effect of making the party charged and his or her wife or husband competent witnesses for the defence was to make them liable to cross-examination. The result would, or at any rate might, have been that the privilege given by s. 3 of the Act of 1853, although in language applicable to all cases, would have been held to have been taken away, and that the witness would have been compelled to answer in cross-examination questions relating to marital communications. The effect of para. (*d*) of s. 1 of the Act of 1898 is to preserve, in cases to which that section applies, the privilege conferred by s. 3 of the Act of 1853.

It is said on behalf of the respondent, and it was held by Simonds J., that there existed, and still exists at common law, independently of s. 3 of the Act of 1853, a rule of privilege protecting communications between husband and wife during marriage; and that this privilege continues to subsist notwithstanding that the marriage has come to an end through death or dissolution. The appellant on the other hand contends that no such privilege ever existed at common law; that the only rule of privilege protecting marital communications is that enacted by s. 3 of the Act of 1853; and that this section is by its language confined to the case of a subsisting marriage, and does not apply where the marriage has come to an end.

It is important to appreciate that the alleged common law rule upon which the respondent relies is admittedly a rule of privilege, and does not make the evidence inadmissible. It is not suggested that the Court would refuse to hear evidence of a marital communication if the privilege were to be waived. As a result of this, the alleged rule cannot, I think, be extracted from decisions which merely state or recognize the incompetence of spouses to give evidence for or against one another. It is for this reason that I am unable to find authority for the existence of the alleged rule in any of the three decisions which were particularly relied on by Simonds J. in his judgment, and by counsel for the respondent in this Court. The first of these decisions is that of Lord Alvanley in *Monroe* v. *Twisleton*. (1) In that case the plaintiff called the divorced wife of the defendant to prove the contract sued upon. Counsel for the defendant objected to her competence. Counsel for the plaintiff contended that she was an admissible witness. Lord Alvanley held that the witness was competent to prove "any fact arising after the divorce"; but that, notwithstanding the divorce, she was incompetent "to prove a contract "or anything else which happened during the coverture." He is thus holding that the evidence of the witness against her late husband was inadmissible, and he states the proposition in terms which include the whole of the evidence which she might give, whether it related to marital communications or not. It does not appear from the report whether the evidence proposed to be given related to any such communication, since the objection was not to any particular question, but to the competence of the witness. Whether it did or did not relate to such communications, the Court would not listen to it. The real point decided by this case, in my opinion, was that the incompetence of one spouse to give evidence against the other persisted even after the dissolution of the marriage, where the subject-matter of the evidence was "anything which "happened during the coverture." It is so treated in the Second Edition of Peake's Law of Evidence, published in 1804, two years after the decision (see p. 174). I do not myself see that this decision is any authority for the existence at common law of such a rule of privilege as is suggested. It is true that Lord Alvanley gives as the ground of his decision the fact that during coverture the wife was "bound to secrecy; "what she did might be in consequence of the trust and "confidence reposed in her by her husband," and enlarged on the evils which might flow from the disclosure of confidential communications between husband and wife. This appears to me to be merely adding one to the many and diverse reasons given in the authorities for the rule under which one spouse was not competent to give evidence against the other: and this appears to be the view taken in the First Edition of Taylor on Evidence, referred to below. Nor do I think that the suggested rule of privilege can be deduced from the reasons given for the decision. If it were possible to deduce from those reasons a general and independent rule relating to marital communications, it would be a rule which would exclude the evidence altogether, and not one of mere privilege.

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(1) Peake's Add. Cas. 219, 220.

Monroe v. *Twisleton* (1) was followed by Best C.J. in *Doker* v. *Hasler* (2), where the other spouse was dead. The learned Chief Justice said: "I think that the happiness of the marriage "state requires that the confidence between man and wife "should be kept for ever inviolable," a principle which, as I have already pointed out, would exclude the evidence altogether.

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(1) Peake's Add. Cas. 219.

(2) Ry. & Moo. 198.

The third case is *O'Connor* v. *Marjoribanks*. (1) The action was in trover by administratrixes of a deceased person, and related to certain plate in the hands of the defendants, who were bankers. The defence was that the plate had been deposited with the bank by a third person as security for a loan, pursuant to an agreement between the deceased and the third person, and that the loan had not been repaid. The alleged agreement was put in issue by the plaintiffs. It appeared that the agreement, if it existed, was made between the wife of the deceased and the third person, the deceased being at the time in India. The widow's evidence was taken on commission and tendered by the defendants. It was to the effect that she had her husband's authority to pledge the plate. At the trial Maule J. admitted the evidence de bene esse, but reserved the point, which was afterwards argued in the Common Pleas before Tindal C.J. and Coltman J. and Maule J. The decision followed that in *Monroe* v. *Twisleton* (2), and extended the principle of that decision to a case where the personal representatives of a deceased husband were parties to the suit. Thus Tindal C.J. says (3) that it is a general rule of law "that a wife never can be admitted as a witness either for or against her husband." He held that this rule extended to exclude the evidence of both parties to a marriage "as to transactions occurring during their joint lives," and refused to limit this extension to the case of confidential communications. Coltman J. said (3) that during the lifetime of the spouses "the rule then is, that, with the exception of "certain well-known instances, neither husband nor wife "can be admitted as a witness for or against the other; and I "think that no such distinction as that now attempted to be "set up, arises upon the death of one of the parties." Maule J. said (4): "The policy of the law (in order to ensure conjugal "confidence) has laid down a definite rule, that, in no case, "shall husband and wife be allowed to give evidence for or

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(1) 4 Man. & G. 435.
(2) Peake's Add. Cas. 219.
(3) 4 Man. & G. 443.
(4) Ibid. 446.

"against each other. That rule extends to this case; for, "though the husband is dead, the reason for the rule applies "as strongly as if he were alive." What I have said as to the grounds and effect of the decision in *Monroe* v. *Twisleton* (1) applies equally to this case. It is to be noticed that if the case had been one of privilege, and if the privilege had been that of the widow, she must have been held to have waived it.

No authority for the existence of the alleged common law rule of privilege has been discovered by the researches of counsel, or by those of my colleagues and myself. No hint of its existence is given in Duncombe's Tryals per Pais, published in 1666, where the rule that a wife is an incompetent witness for or against her husband is stated at p. 138; or in Chief Baron Gilbert's Law of Evidence, published in 1760, where the same rule is stated at pp. 135–6; or in Peake's Law of Evidence (1804), already referred to, where the same rule is stated at p. 173. In Starkie's Law of Evidence (Third Edition), published in 1842, the rules as to the incompetence of spouses to give evidence for or against one another are discussed in vol. ii., pp. 549 and following. On p. 551, in dealing with the case where neither spouse is a party or interested in the result, the learned author says: "Where neither of them is either a "party to the suit, or interested in the general result, the "husband or wife is, it seems, competent to prove any fact, "provided the evidence does not directly criminate the other, "or, *as it seems*, involve the disclosure of some communication "made by the other." No authority is cited for the semble which I have underlined. In the First Edition of Best on Evidence, published in 1849, in a chapter beginning on p. 455, and headed "Evidence Rejected on Grounds of Public Policy," the learned author deals under that head with a variety of matters, some of them relating to inadmissible evidence, others to evidence protected by privilege. The principle which he says applies to all these cases is that the "evidence . . . . is rejected on the ground that from its "reception some collateral evil would come to third parties, "or to society" (p. 455). At p. 463 he says: "The applications

(1) Peake's Add. Cas. 219.

"of this principle to social life are few. The principal instance "is in the case of communications between husband and wife." As authority for this proposition, he cites nothing but an American text-book, Greenleaf on Evidence, published in 1842. In that work, at pp. 289–90, the author says that such communications are privileged, the reason given being the necessity of preserving confidence between spouses. The English authorities which he cites in support of this are *Monroe* v. *Twisleton* (1) and *Doker* v. *Hasler* (2), which, as I have already shown, are concerned with a different rule altogether.

In the First Edition of Taylor on Evidence, published in 1848, vol. ii., the incompetence of spouses to give evidence for or against one another is discussed at length on p. 898 and following pages. The unsatisfactory nature of the various reasons given for that incompetence is examined. In particular, the learned author refers to the suggested reason based on identity of interest, and to that based on the necessity of preserving marital confidence. The former of these he says is obviously too narrow. Of the latter he says (at p. 899): "On the other hand, the second ground, which rests on the "sacredness of conjugal communications, is too large, since "it would exclude all such communications, even where "married persons were witnesses in actions between strangers; "whereas it is notorious that in these cases a wife might be "called to prove that on a certain occasion she had acted with "the consent or by the authority of her husband, and where "the husband has been previously examined she has even "been asked whether he deserved to be believed on his oath." He cites an interlocutory observation of Maule J. in *O'Connor* v. *Marjoribanks* (3), where that learned judge said that the widow in that case might have been called to prove that she had pledged the plate with her husband's consent, if the question had arisen between third parties.

In this edition of Taylor, there is in vol. i., beginning at p. 615, a chapter headed "Of Evidence excluded on Grounds of Public Policy," a title similar to that of the chapter in Best

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(1) Peake's Add. Cas. 219.

(2) Ry. & Moo. 198.

(3) 4 Man. & G. 435, 440.

C. A.
1939
SHENTON
v.
TYLER.
Sir Wilfrid Greene M.R.

already referred to. But Taylor's chapter does not, of course, include the alleged rule. Taylor's view is supported by an observation of Erle J. in *Stapleton* v. *Crofts.* (1) That case was decided after the passing of the Evidence Act, 1851, but before that of the Act of 1853; and it was there held that the Act of 1851 did not render the wife of a party a competent witness. Erle J. dissented on this point; but the fact that he dissented does not detract from the value of his examination of the common law rules relating to the evidence of spouses. In the course of that examination, he said (2): "With respect "to the protection of confidential communications between "husband and wife, there seems good reason for such protection "at all times; *but no such principle has been brought into* "*practice.*" The italics are mine.

From this review of the English text-books and the observations of Maule J. and Erle J., I conclude that the alleged common law rule of privilege protecting marital communications as such never existed. This view is confirmed by the language used by the Common Law Commissioners in the passage from their Second Report already quoted. In that passage they recommend that marital communications should be protected; they do not suggest that the law as it then stood protected them already. This recommendation was, as I have already said, adopted by the Legislature in language apt for the enactment of a new rule, and not for the preservation of an existing one. If the alleged rule of privilege existed, the question would, of course, arise—whose was the privilege? Was it that of the spouse who made the communication? Or of the spouse to whom it was made? Or of both? If the alleged rule was designed to protect marital confidence, the privilege should apparently have been that of the spouse who made the communication; or perhaps of both spouses; but not that of the spouse to whom it was made. Yet the Legislature has enacted in s. 3 of the Act of 1853 that the privilege shall be that of the spouse witness who can, accordingly, if he or she desires, disclose all confidential communications made to him or her by his or her spouse, however unwilling that spouse may be to have the disclosure made Moreover, the alleged common law rule is said to apply to all marital communications, whereas the statutory privilege conferred by s. 3 of the Act of 1853 only protects communications made to the witness. It seems to me impossible to reconcile the provisions of s. 3 with the theory that it was superimposed upon a rule of common law then recognized as existing and envisaged as continuing after the passing of the Act, and co-existing with the new statutory rule.

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(1) 18 Q. B. 367.

(2) Ibid. 374.

The authorities and text-books which I have examined in the course of this judgment are all earlier in date than the Act of 1853. I must confess to feeling some surprise at the result of that examination ; since the existence of the alleged rule of common law has, I think, in modern times been assumed by many lawyers. It is not without significance that the only English text-book earlier in date than the Act of 1853 in which the existence of the alleged rule is asserted is the First Edition of Best on Evidence, quoted above, where the only authority cited is the American work of Professor Greenleaf. In another well known American text-book, Wigmore on Evidence, published in 1904–5, the alleged rule is discussed at length on p. 3257 of the fourth volume, and following pages. In that work the privilege is said to exist at common law, and it would appear that its existence has been recognized in the United States. On p. 3258 the learned author gives the history of the alleged privilege in a passage which deserves to be quoted at length : "The privilege for communications "between husband and wife," he says, "is apparently, in time "of origin, the second of such privileges to be enforced at "common law, and yet the last to be definitely recognised "and distinguished. In the second half of the 1600s an instance "of its application is found ; and yet the explicit statement "of the privilege, as a distinct one from any other rule, did not "come in England until the statutory reforms of the Common "Law Procedure Act, just as the second half of the 1800s "was beginning. The explanation of the paradox is that "until that time the present privilege for communications "between husband and wife had not been plainly separated "from the other privilege of husband and wife not to testify "to any facts against the other. This latter privilege was "fully established by the end of the 1600s. But among the "various reasons advanced for its support was the policy of "protecting domestic confidence by prohibiting their mutual "disclosures. In other words, the true policy of the present "privilege was perceived, and yet it was not enforced in the "shape of any rule distinct from the old-established privilege "of each not to testify against the other as a party or interested "in the suit. That the two are distinct is plain; for the "privilege not to testify against the other is broader in the "respect that it excludes testimony to any adverse facts even "though they have been learned wholly apart from marital "confidence, and is narrower in the respect that it applies only "to testimony adverse to its tenor and adverse to a party to "the cause or to one in an equivalent position. Nevertheless, "the privilege against adverse testimony remained for a long "time alone in its recognition; and not unnaturally, for two "reasons. In the first place, in the great majority of instances "in which it was desired to make a wife reveal her husband's "communications, he was an adverse party, and his long-"established privilege against her adverse testimony served "equally to protect him against that sort of her adverse "testimony as against any other. In the second place, the "other instances where it might be desired that she should "reveal his communications would ordinarily be those in "which he himself desired her testimony in his behalf; and "this was of course prevented by her disqualification. Thus "there remained only one situation, and that the least common "one, in which the two existing rules of disqualification and "privilege did not already suffice to dispose of the evidence, "namely, the situation in which the husband was not a party "but an indifferent person and yet his communications to his "wife were material to the cause and were offered to be proved "by her. In view of the rarity of this situation under the "system of married women's disabilities then prevailing, it is "not to be wondered that at common law the question was "not forced upon the consideration of the Judges, and that the

C. A.
1939
SHENTON
v.
TYLER.
Sir Wilfrid
Greene M.R.

"recognition of the present privilege as a rule independent of any "other was so belated. Not until the marital disqualification "and the marital privilege against adverse testimony were "proposed to be abolished or modified did the existence "of this third aspect of the subject begin to be perceived. "Accordingly, when the legislators in the various jurisdictions "took the first steps, in the period from 1840 to 1870, to "reform the other two rules, by abolishing or restricting the "disqualification and the other privilege, they invariably "preserved by express enactment the present privilege for "communications. So this privilege, hitherto existing rather "in principle than in rule, practically begins its existence and "is defined in its terms by the legislation of that period."

The author here refers to the rule making husband and wife incompetent to testify against one another as a rule of privilege, which is not the case in English law, as I have already said.

The instance in the second half of the 1600s which the author gives is to be found in the trial of Lady Ivy before Jeffreys C.J. (1) But this is not really an instance of the application of the alleged rule, since the evidence was evidence which tended to incriminate the husband of the witness, and was apparently rejected on that ground.

It appears from a later passage in Wigmore (p. 3268) that the privilege which is recognized to exist in the United States is there regarded as belonging to the spouse making the communication, or possibly to both spouses (see note 1 on p. 3269) and not to the witness spouse to whom the communication was made. I have already referred to this aspect of the matter.

I will now refer briefly to the text-books published since the Act of 1853. In the Fourth Edition of Taylor, published in 1864, the privilege affecting marital communications now appears in the chapter headed (as in the First Edition already referred to) " Evidence excluded on Grounds of Public Policy " (p. 786) ; and it is treated as being purely statutory. The same treatment is found in the latest (the 12th) edition, vol. i., p. 572.

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(1) (1684) 10 State Trials, 628.

In the Second Edition of Wills on Evidence (published in 1907) it is said (p. 287) that at common law " husband and wife "were neither compellable *nor competent* to disclose in evidence "any communications upon any matter whatsoever which "had passed between them during marriage." The only authority cited for this proposition is *O'Connor* v. *Marjoribanks*. (1) On p. 289 the learned authors say: " With "regard to communications between husband and wife during "the marriage it would seem that neither husband nor wife is "now " (that is, since the Act of 1853) " incompetent to give "evidence; but each of them is entitled to the privilege of "not disclosing such communications in any proceedings "whatsoever, although if either of them should waive the "privilege and give evidence thereon, they would of course "render themselves liable to cross-examination with regard "to the same." It would appear from these two passages that in the view of the authors s. 3 of the Act of 1853 had impliedly abrogated a pre-existing common law rule affecting not merely compellability but competence. I cannot agree with the view that there was a common law rule which made marital communications as such inadmissible any more than I can agree with the view that there was a common law rule which made them privileged. If there was a common law rule making marital communications as such not merely privileged but inadmissible, distinct from the rule which made spouses incompetent as witnesses for or against one another, it is impossible to suppose that no single author writing before 1853 would have mentioned it; or that Maule J. and Erle J. would have said what they did. It is not referred to in the Second Report of the Common Law Commission; and, if it had been thought to exist, s. 3 of the Act of 1853 would have been worded very differently. It is clearly impossible for a common law rule excluding evidence of marital communications altogether to coexist with the statutory privilege conferred by s. 3 of the Act of 1853. If such a common law rule had existed, the only possible result would be that it was impliedly repealed in toto by the section—

(1) 4 Man. & G. 435.

it cannot have been left in part operative. Much less can it have been converted by the section into a rule of privilege, and left to stand as such side by side with the statutory rule and to supplement it.

In Stephen's Digest of the Law of Evidence (1936, 12th ed., p. 146) the only rule referred to is the statutory rule. The same is true of Phipson on Evidence (1930, 7th ed., p. 205), although there is an obscure reference to "the old common law rule," and to *O'Connor* v. *Marjoribanks* (1) and *Doker* v. *Hasler*. (2) In Cockle's Cases and Statutes on the Law of Evidence (1938, 6th ed., p. 321) the privilege is said to be a statutory one under the Act of 1853. The same view appears in the Second Edition, p. 728, of Halsbury's Laws of England, although reference is made in a footnote to *O'Connor* v. *Marjoribanks* (1); *Doker* v. *Hasler* (2); and *Monroe* v. *Twisleton*. (3) The Twelfth Edition of Best on Evidence (1922), p. 506, merely repeats the statement based on Greenleaf to which I have already referred, with an added reference to s. 3 of the Act of 1853.

I have thought it convenient to refer to the views expressed in modern text-books. There is nothing in them which leads me to alter the opinion which I have formed from an examination of the older authorities. Indeed, they confirm it, since they show that the view that there was a rule at common law is based on a misapprehension as to the rule which was applied in *Monroe* v. *Twisleton* (3), *Doker* v. *Hasler* (2); and *O'Connor* v. *Marjoribanks*. (1) It may well be that, if the legislative reforms in the middle of the last century had not taken place, the common law might in time have evolved a rule of privilege affecting marital communications as such. Had it done so, the privilege might well have been different to that conferred on the witness by s. 3 of the Act of 1853. But that section became law before any such rule was established (see the statement of Erle J. in the passage already quoted); and this forestalled a possible development of the common law. After the enactment of that section, all possibility of such a development was removed.

(1) 4 Man. & G. 435.
(2) Ry. & Moo. 198.
(3) Peake's Add. Cas. 219.

If my view is right that the only rule that exists is that contained in s. 3 of the Act of 1853, it remains to consider whether, under that section, upon its true construction, the privilege continues to exist after the marriage has come to an end. In my opinion it does not. The section in terms relates only to husbands and wives; and no principle of construction known to me entitles me to read into the section a reference to widowers or widows or divorced persons. I am aware that this view is not in agreement with that expressed by some text-book writers. But their view is in most cases based on the false analogy of *Monroe* v. *Twisleton* (1); *Doker* v. *Hasler* (2); and *O'Connor* v. *Marjoribanks.* (3) In the Twelfth Edition of Taylor, at p. 573, the point is left open. Best (12th ed., at p. 506) does not refer to the three cases mentioned, but cites the opinion of Greenleaf. Phipson (7th ed., at p. 205) says that the analogy of those cases "probably" applies. Stephen (12th ed., p. 146, note 3) treats the point as doubtful. Halsbury (2nd ed., p. 728, note (*n*)) and Lush on Husband and Wife (4th ed., at p. 599) both say that those cases apply.

In my opinion, it is not legitimate to expand the plain language of a section which confers privilege in all proceedings, whether the witness or the other spouse is a party or not, by applying the analogy of previous cases which dealt not with privilege, but with competence, and were concerned only with actions in which a former spouse or his legal personal representative was a party to the action.

The importance of the question involved and the obscurity which surrounds it must be my justification for the length of this judgment. It is based on a quantity of material which was not before Simonds J., and I have, therefore, less hesitation than I otherwise would have had in differing from the view which he took.

In the result, the appeal is allowed with costs. The costs below will be costs in the action.

FINLAY L.J. I have had an opportunity of reading the judgment which has just been delivered by the Master of the Rolls, and also the judgment which is about to be delivered by my brother Luxmoore; and I have consulted all—to be exact, not all, but all with one single exception—the very numerous authorities to which they have referred. I agree with their judgments; and I have not thought it necessary in those circumstances to prepare a separate judgment of my own.

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(1) Peake's Add. Cas. 219.
(2) Ry. & Moo. 198.
(3) 4 Man. & G. 435.

Luxmoore L.J. This is an appeal from a refusal by Simonds J. to allow the plaintiff in the action to administer certain interrogatories to the defendant in support of allegations made in the statement of claim.

The material allegations are to the effect that one Edmund Deeble Tyler, who is dead, and is referred to in the statement of claim as the testator, communicated to his wife, the defendant in the action, his wish that she should pay to the plaintiff, out of the testator's estate, during the residue of the plaintiff's life, the sum of *2l.* per week; that the defendant promised the testator that she would pay that weekly sum; and that on the faith of that promise the testator allowed the defendant to become entitled under his will to his residuary estate.

The plaintiff has pleaded that she is unable to give particulars of the promise until after discovery.

The defendant by her defence denies that any such wish was expressed, and that any such promise was made.

The plaintiff seeks to establish her case by administering to the defendant the following interrogatories: (1.) Did not your late husband communicate to you during his lifetime his wish that you should, during the lifetime of the plaintiff, pay to her or to some other and what person for her own use the weekly sum of *2l.*, or some other and what weekly sum? (2.) If yea, what was the date of such communication? (3.) Did you not promise your late husband that you would, during the lifetime of the plaintiff, pay to her or to some other and what person for her use, the weekly sum of *2l.*, or some other and what weekly sum? (4.) If yea, what was the date of such promise? Obviously the interrogatories are relevant to the issues raised by the pleadings in the action. The sole ground of objection to the interrogatories taken before Simonds J. and in this Court is that the defendant cannot be compelled to answer any of the interrogatories, because each of them relates to communications passing between the defendant and her deceased husband during the existence of the marriage tie; and there is, it is said, an absolute and unqualified rule at common law which prevents any communication passing between husband and wife during that period from being divulged; and, consequently, neither spouse is compellable, by interrogatory or otherwise, to give evidence upon matters which have been so communicated by one to the other.

Simonds J., after considering certain reported cases, to which I shall refer later, accepted this argument, and refused to allow the interrogatories, stating the alleged rule substantially in the words used by me in my statement of the defendant's argument. Simonds J. further held that the alleged rule has not been qualified or limited by the provisions of the Evidence Amendment Act, 1853, to which also I must refer.

The question is one of importance, for, if the defendant's contention is correct, the defendant may be enabled for her own benefit to prevent the establishment of the secret trust alleged by the plaintiff, and, by so doing, frustrate the wishes of her husband.

It is to be observed that the rule as stated is in its first branch directed to the competency of a spouse to give evidence with regard to communications between the husband and wife, for it states "that no such communication is to be divulged," while in its second branch it is directed to the compellability of a spouse to divulge any such communications; or, to put it in other words, it is directed to a claim of privilege by a spouse in respect of any such communication, if questioned with regard to it, although the evidence may be admissible. It is material to bear these distinctions in mind.

The substantial questions to be determined are, first, what is the common law rule with regard to communications between spouses made during coverture; second, to what extent has that rule been affected by statute? The earliest statement I have been able to discover on the subject is to be found in a note which appears in Coke's Commentary on Littleton, at folio 6 (*b*), published in the year 1628. This note states: "It hath been resolved by the Justices, that a wife "cannot be produced either against or for her husband, "'quia sunt duae animae in carne una'; and it might be a "cause of implacable discord and dissention between the "husband and the wife, and a meane of great inconvenience." Apart from this note, the earliest text-book in which I have found any reference to the matter is a work by S. Euer, published in 1666, intituled Tryals per pais by Duncombe or the Law concerning Juries by Nisi Prius. At pp. 138 and 139 it is stated: "The wife cannot be a witness for, or against "her husband: . . . . but kinsmen never so near, tenants, "servants, masters, counsellors and Atturneys, etc., may be "witnesses."

In Gilbert on Evidence, in the Sixth Edition, published in 1801, the only statement with regard to the matter is that "husband "and wife cannot be admitted to be witnesses for or against "each other, for if they swear for the benefit of each other, "they are not to be believed, because their interests are "absolutely the same, and, therefore they can gain no more "credit when they attest for each other than when any man "attests for himself. And it would be very hard that a wife "should be allowed as evidence against her own husband when "she cannot attest for him; such a law would occasion "implacable divisions and quarrels, and destroy the very legal "policy of marriage that has so contrived it that their interest "should be but one, which it could never be if wives were "admitted to destroy the interest of their husbands, and the "peace of families could not easily be maintained, if the law "admitted any attestation against the husband." This passage is followed by the statement of a number of exceptions to the rule (see op. cit., pp. 119 to 120); but it is immaterial to refer to them.

In Starkie's Practical Treatise on the Law of Evidence, published in 1824, under the heading "Competency" (see pp. 706 and following), it is stated that "the husband and wife "cannot be witnesses for each other, for their interests are "identical, nor against each other on grounds of public policy, "for fear of creating distrust and sowing dissensions between "them and occasioning perjury. So important is this rule "that the law will not allow it to be violated even by "agreement, the wife cannot be examined against the husband, "although he consent, and the principle is further preserved "by adhering to the rule even after the marriage tie has been "dissolved by the death of one of the parties or by a divorce "for adultery." The learned author considers the application of these principles to three classes of cases—namely: (1.) where the husband or wife is a party; (2.) where one of them, not being a party, is interested in the result of a proceeding between others; and (3.) where neither of them is a party to the suit, or interested in the event.

In the first class, it is stated that the rule is universal that the husband or wife of a party is altogether incompetent as a witness in either civil or criminal proceedings. In the second class, a distinction is drawn between the giving of evidence for and giving it against the other; and in the discussion with regard to this class, the learned author states (see p. 709) that "the party to whom the testimony of the wife "is essential has a legal interest in her evidence, and as he "might insist on examining the husband, it would it seems be "straining the rule of policy too far to deprive him of the "benefit of the wife's testimony."

In dealing with the third class of case (see p. 709) it is stated that "the husband or wife is it seems competent to "prove any fact, provided the evidence does not directly "criminate the other or, as it seems, involve the disclosure "of some communication made by the other." On p. 711 it is further stated that "although there does not appear to be "any express decision on the subject it seems to be clear in "principle that neither party can be examined in a collateral "proceeding as to any matter of confidential communication "by the other."

It will be observed that in none of the passages which I have quoted is there any reference to compellability as distinguished from competency; and I have been unable to discover any reference to privilege as distinct from competency in any of the books named.

Professor Holdsworth, in his History of English Law, when dealing with the question of competency of parties to a suit and persons interested as witnesses, says (vol. ix., p. 197), that the disqualification of husband and wife to testify on one another's behalf "is the one case in which relationship "is allowed to disqualify; and this fact is quite sufficient to "negative any derivation from the civil or canon law, which "disqualified many other relations, and even servants." He says that historically the disqualification appeared at about the same period as the disqualification of parties and persons interested. In this connection Professor Holdsworth says that Coke's statement, to which I have already referred, is one of the earliest and indicates that the law was then new. Although I have made a wide search, I have been unable to find any statement on the subject earlier than the note in Coke. Professor Holdsworth points out that although at common law a party was incompetent as a witness, and could not be compelled to appear and answer questions addressed to him by his opponent, this rule did not apply to the Court of Chancery, or to the Ecclesiastical Courts. Blackstone in his Commentaries, vol. iii., p. 382, says: "It seems the height "of judicial absurdity, that in the same cause between the "same parties, in the examination of the same facts, a discovery "by oath of the parties should be permitted on one side of "Westminster Hall and denied on the other, or that the "judges of one and the same court should be bound by law "to reject such a species of evidence, if attempted on a trial "at bar, but when sitting the next day as a court of equity, "should be obliged to hear such examination read and to found "their decrees upon it."

In 1853 the Commission on Common Law Procedure in their Second Report (p. 13) stated: "The question how far "communications of married persons inter se should be "matter of testimony in Courts of Justice, stands on a very "different ground" (that is, from that of compelling a husband or wife to testify to matters of fact against the other). The report continues: "So much of the happiness of human life "may fairly be said to depend on the inviolability of domestic "confidence, that the alarm and unhappiness occasioned to "society by invading its sanctity, and compelling the public "disclosure of confidential communications between husband "and wife, would be a far greater evil than the disadvantage "which may occasionally arise from the loss of light which "such revelations might throw on the questions in dispute"; hence all communications between them should be held privileged. It is to be observed that there is no statement to be found in the Report that such communications were privileged; nor is there any reference to any existing rule of privilege relating to such communications; a remarkable omission if in fact any such rule was in existence at the date of the Report. The signatories to the Report are Jervis L.C.J., Baron Martin, Cockburn L.C.J., Lord Bramwell and Willes J. A consideration of these names makes the evidential value of the Report apparent.

In the well known American text-book on Evidence by Wigmore, there is a lengthy discussion with regard to what is there described as the testimonial disqualification in the case of husband and wife (see vol. i., at p. 729 and the following pages); while in vol. iv., at p. 3257 and the following pages, the history of privilege for communications between husband and wife as distinguished from this testimonial disqualification is set out at length. The learned author undoubtedly recognizes the existence of the privilege with regard to communications passing between spouses in the United States of America; and explains that in some of the States the privilege rests on express statutory enactment while in others it rests upon rule of the law. In tracing the history of the matter he says, at p. 3258, that "the explicit statement of the "privilege, as a distinct one from any other rule, did not come "in England until the statutory reforms of the Common Law "Procedure Act, just as the second half of the 1800s was "beginning"; and he points out that in 1852 Erle J., in *Stapleton* v. *Crofts* (1), stated that "as no protection was given "to conjugal confidence in respect of the wives of witnesses, "not parties, the rule," (that is, of privilege) "must be re-"garded as not yet established." The learned author goes on to state that the explanation of what he describes as the paradox is that "until that time the present privilege for "communications between husband and wife had not been "plainly separated from the other privilege of husband or wife "not to testify to any facts against the other." It is to be noted that the latter was not in England a question of privilege, but of competency.

The cases referred to by Simonds J. as supporting the rule, as enunciated by him, do not in my opinion extend so far. *Monroe* v. *Twisleton* (2) was decided in 1802. The rule there laid down is that where a man and wife are divorced, the wife is not competent to prove a contract made by her husband previous to divorce. Lord Alvanley said (3): "To prove any fact "arising after the divorce this lady is a competent witness, "but not to prove a contract or anything else which happened "during the coverture. She was at that time bound to secrecy; "what she did might be in consequence of the trust and "confidence reposed in her by her husband; and miserable "indeed would the condition of a husband be, if, when a woman "is divorced from him, perhaps for her own misconduct, all "the occurrences of his life, entrusted to her while the most "perfect and unbounded confidence existed between them, "should be divulged in a court of justice."

A consideration of the report shows that the statement of the rule was made with reference to the competency of a husband or wife as a witness for or against the other, and has nothing to do with the question whether, in cases where a husband or wife was a competent witness, he or she could plead privilege with regard to any communication made to him or her during the coverture. In *O'Connor* v. *Marjoribanks* Tindal C.J. said (4): "We are asked to confine the rule" (that is, as to

(1) 18 Q. B. 367, 374.
(2) Peake's Add. Cas. 219.
(3) Peake's Add. Cas. 219, 220–1.
(4) 4 Man. & G. 435, 443.

competency) "to cases where the communications between the "husband and wife are of a confidential nature." The Chief Justice continued: "But such a limitation of the rule would "very often be extremely difficult of application; and would "introduce a separate issue in each cause as to whether or not "the communications between husband and wife were to be "considered of a confidential character." And he said: "Upon the whole, I think it better to adopt Lord Alvanley's "rule in *Monroe* v. *Twisleton* (1)."

In *Doker* v. *Hasler* (2) Best C.J. followed the decision of Lord Alvanley in *Monroe* v. *Twisleton* (1), and refused to allow a woman after divorce to speak of conversations between herself and her husband during the existence of the marriage. Here, also, the question was not one of privilege, but of competency.

In Best on Evidence, Second Edition, published in 1854, it is stated (at pp. 694 and 695) that the evidence of communications between husband and wife is rejected on grounds of public policy. Again, the statement of the rule is directed to competency; and there is no suggestion that the evidence is admissible, although it may not be compellable. In the Evidence Act, 1843, which removed the incompetency of witnesses on the ground of interest, there is a proviso preserving the incompetency of parties and their husbands or wives.

In 1851 the Evidence Act passed in that year provided, by s. 2, that parties to any action, suit, or proceeding should be competent and compellable witnesses; while s. 3 provided that nothing contained in the Act should render any person who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself, or shall render any person compellable to answer any question tending to criminate himself or herself, or shall in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband. The language of the last mentioned section gave rise to a doubt whether husbands and wives were not thereby by implication rendered competent witnesses for or against each other in civil proceedings. This doubt was determined in the negative in *Stapleton* v. *Crofts* (1), and in consequence of this decision and of the Second Report of the Commissioners on Common Law Procedure, to which I have already referred, the Evidence Amendment Act, 1853, was passed. This Act provided by s. 1 that husbands and wives of parties were to be admissible witnesses in any suit, action or other proceeding in any Court of Justice. By s. 2 it was provided that nothing contained in the Act should render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband, in any criminal proceeding or in any proceeding instituted in consequence of adultery; while by s. 3 it was provided that no husband should be compellable to disclose any communication made to him by his wife during the marriage and no wife should be compellable to disclose any communication made to her by her husband during the marriage. I have been unable to find, in any reported case decided or in any text-book published before the passing of this Act, any statement where a husband or wife is a competent witness, he or she is entitled to refuse to answer any question with regard to communications passing between them.

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(1) Peake's Add. Cas. 219. (2) Ry. & Moo. 198.

I should point out that the statements in the most recent text-books, for example, the Twelfth Edition of Taylor on Evidence and the Hailsham Edition of Halsbury's Laws of England, vol. 13, title "Evidence," with regard to the position of husbands and wives with reference to communications passing between them, do not appear to be accurate: for in neither work does it appear that any distinction is recognized between competency and compellability. In Taylor on Evidence (see 12th ed., p. 572) in the chapter dealing with "Evidence excluded on Grounds of Public Policy," it is stated "the matters which "the law says shall not be the subject of evidence in a court

(1) 18 Q. B. 367.

"of justice are (I.) communications which have passed between "husband and wife during marriage." In para. 909 (A) it is stated "The first class of subjects which the law protects from "disclosure includes all communications between husband "and wife." "No husband," says the Legislature, "shall "be compellable to disclose any communication made to him "by his wife during the marriage and no wife shall be com-"pellable to disclose any communication made to her by her "husband during the marriage." "This enactment" (the reference is to s. 3 of the Evidence Amendment Act, 1853) the author says "rests on the obvious ground that the admission "of such testimony would have a powerful tendency to disturb "the peace of families, to promote domestic broils and to "weaken if not to destroy that feeling of mutual confidence "which is the most endearing solace of married life. The "protection is not confined to cases where the communication "sought to be given in evidence is of a strictly confidential "character, but the seal of the law is placed upon all com-"munications of whatever nature which pass between husband "and wife." It is to be observed that the learned author draws no distinction between competency and compellability; and also, that he attributes the protection afforded to communications between husband and wife during marriage to the statute (Evidence Amendment Act, 1853, s. 3), and not to any rule of common law; while the reasons he gives for the statutory protection are the same somewhat unsatisfactory reasons to be found in the cases decided before the statute was passed. In Halsbury's Laws of England, Hailsham Edition, vol. 13, title "Evidence," at p. 728, it is stated in the text that a husband or wife may refuse to disclose any communication made to him or her during the marriage by the other party to the marriage; while in the note, relating to the statement quoted, reference is made to the Evidence Amendment Act, 1853, s. 3. The note further states that the rule is not limited to communications of a strictly confidential character, and reference is made to *O'Connor* v. *Marjoribanks*. (1) The note continues: "and [it] applies even after the marriage

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(1) 4 Man. & G. 435.

"tie has been severed by death or divorce: *Doker* v. *Hasler* (1); "*Monroe* v. *Twisleton* (2)." As I have already pointed out, none of the cases referred to in this note have any reference to compellability (that is, privilege); but are concerned solely with competency (that is, admissibility).

The conclusion at which I have arrived is that, before the passing of the Evidence Act, 1851, there was a rule of the common law that communications between husband and wife were not admissible in evidence; and since the evidence was itself inadmissible, no question of privilege arose; and there was, therefore, no rule dealing with this aspect of the case. It was not until the evidence of the husband or wife became admissible by reason of the Evidence Act, 1851, and the Evidence Amendment Act, 1853, that the question of compellability arose, and was met by the express provisions of s. 3 of the last mentioned Act. The privilege, therefore, appears to me to rest entirely on the provisions of s. 3 of the 1853 Act; and I am satisfied that there was and is no rule of common law, apart from those provisions, conferring or recognizing any such privilege.

The question arises, how far does this statutory privilege extend? The section is silent as to a widower or widow, or divorced person. None of the cases cited have in my opinion any bearing on this question. In Stephen's Digest of the Law of Evidence, 12th ed., p. 146, it is stated that it is doubtful whether s. 3 of the Act of 1853 has any application to a widower or divorced person, questioned after the dissolution of the marriage, as to what had been communicated whilst it lasted: a statement which must apply with equal force to a widow.

Plainly, the words of the section do not include the case of any persons other than husbands and wives: and since I have come to the conclusion that the privilege is statutory, I am unable to find any warrant for extending the words of the section by construction so as to include widowers and widows and divorced persons.

It is for these reasons, the majority of which were not

(1) Ry. & Moo. 198.

(2) Peake's Add. Cas. 219.

C. A.
1939
SHENTON
v.
TYLER.
Luxmoore L.J.

put before the learned judge, that I have arrived at a different conclusion to that reached by him; I hold that there is no ground on which the defendant, who is a widow, is entitled to refuse to answer all or any of the interrogatories propounded on behalf of the plaintiff.

In the result, I agree that the order of the learned judge should be reversed; and leave should be given to administer the interrogatories set out in the summons.

Appeal allowed.

Solicitors for the appellant: *John B. Borer, for Loseby, Son & Hammond, Leicester.*

Solicitors for the respondent: *Robinson & Bradley, for Evan Barlow, Son & Fordham, Leicester.*

P. J. B.

BENNETT J.

1939

Feb. 16.

In re COWLISHAW.

COWLISHAW *v.* COWLISHAW.

[1938. C. No. 3838.]

Will—Annuity—" Free of all duties " and " free of all deductions whatsoever "—Payable free of income tax.

A testator bequeathed to his widow during her life an annuity of 900*l*. " free of all duties to commence from the date of my death " and " to be paid free of all deductions whatsoever " :—

Held, that the annuity was payable to the testator's widow free of income tax.

In re Shrewsbury Estate Acts [1924] 1 Ch. 315 referred to.

By his will, dated February 3, 1937, Charles Henry Cowlishaw, who died on May 20, 1937, bequeathed the following annuity " free of all duties to commence from the date of my "death: to my wife an annuity of nine hundred pounds "during her life to be paid free of all deductions whatsoever "by equal quarterly payments, the first whereof shall be "made three months after my death."

A summons was taken out by the testator's widow for the determination of the question whether the annuity was payable to her free of income tax or was payable to her subject to the deduction of such tax.

A. H. Droop for the applicant. This is a gift free of all duties. It is not possible to suggest any deductions except death duties and income tax. There is no rule that income tax cannot be held to be a deduction, unless that word is used in connection with the word " tax." [He referred to *In re Shrewsbury Estate Acts* (1); *Peareth* v. *Marriott* (2); and *Gleadow* v. *Leetham*. (3)]

A. P. Irby for the respondent executors. There is no reference in this case to " tax." The case is governed by *Lethbridge* v. *Thurlow*. (4)

Bennett J. In my judgment, the widow is entitled under this will to have her annuity paid free of income tax.

(1) [1924] 1 Ch. 315, 336.

(2) (1882) 22 Ch. D. 182.

(3) (1882) 22 Ch. D. 269.

(4) (1851) 15 Beav. 334.

In *In re Shrewsbury Estate Acts.* (1) Warrington L.J. said that two principles emerge from the authorities. "One of "those is . . . . that a mere gift of a clear annuity, or "an annuity clear of all deductions, is not sufficient to "discharge the annuitant to whom the annuity is paid of "any liability under the Acts to pay the tax on his own "income. The last case in this Court which affirms that "principle is *In re Loveless.* (2) But another principle "which I think emerges from those authorities is that the "question is one purely of construction of the particular "document in the case, and that if there appears on the face "of that document an intention that income tax shall be "included in the expression 'deductions' for the purpose of "the instrument which has to be interpreted, then it will "be so interpreted; and I think if there is reference to taxes "in connection with the expression 'deductions,' it may be "and in some cases has been held to be enough to indicate "the intention to which I have referred—namely, that although "income tax is not usually included in the expression "'deductions' unqualified, yet where there is that connection "it may be so included."

With that statement in mind I approach this will, and ask myself whether there is in it anything which shows that the testator intended the expression "deductions" to include income tax. In my judgment there is. The annuity is given free of all duties, and, unless the direction that it is "to be "paid free of all deductions whatsoever" is meaningless and entirely ineffective, the expression "deductions" must include income tax. I cannot hold the direction to be wholly meaningless and ineffective, and therefore decide that the expression "deductions" in this will includes income tax, and that the annuity is payable to the widow free of income tax.

Solicitors: *Doyle, Devonshire & Co., for Abberley & Rawstorn, Burslem; Gregory, Rowcliffe & Co., for Cowlishaw & Son, Uttoxeter.*

J. L. D.

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(1) [1924] 1 Ch. 315, 336, 337.

(2) [1918] 2 Ch. 1.

SIMONDS J.

1939

March 10, 22, 23, 24; *April* 20.

LAWRENCE *v.* SOUTH COUNTY FREEHOLDS, LIMITED.

[1937. L. 1603.]

Covenant—Restrictive covenants—Not to carry on trade or business—Exception of "school or seminary"—School of music—Breach of covenant—Right to enforce—Residential property developed about 1843—*No building scheme for benefit of whole estate—Mutual rights of owners of subdivided plot.*

In 1843 an area of several acres of land at Brighton was conveyed to W., who then proceeded to develop it by laying out a crescent of houses of uniform design with gardens between the houses and a public road. W. agreed with S. to grant a building lease of a plot marked on a contemporary plan, for the erection of two houses on the plot, at a minimum cost of 600*l.* each. The agreement provided that such lease was to contain certain covenants by the lessee, one of which was not to carry on or permit to be carried on on the premises any trade or business excepting only that of a school or seminary, surgeon or apothecary. W. also agreed that every lease and conveyance of the remaining ground fronting on to the crescent should contain similar stipulations and agreements by himself for assuring uniformity and that similar covenants should be entered into by the intending lessees and purchasers.

In 1844 W. entered into an agreement with P. for the building of three houses on one plot. This agreement provided that P. should enter into a deed of covenant containing the covenant as to user mentioned above, but W. did not therein agree to require other lessees to enter into similar covenants, and he afterwards entered into other building agreements. The leases were granted after the houses were built. At a later date the plots were sold and conveyed to various purchasers including P. subject to and with the benefit of the building leases and the covenants and stipulations therein contained, and P. executed the deed of covenant required by his agreement.

The plaintiff and the first defendants who both claimed through P., were respectively the owners of two out of the three houses on the original plot conveyed to P. The conveyances to the three purchasers from P. were all in similar form and contained a recital referring to P's. deed of covenant. The first defendants having let their house to the other defendants for the purpose of carrying on a school of music, the plaintiffs brought this action for breach of covenant and claimed that the whole crescent was the subject of a building scheme the covenants of which they were entitled to enforce against the defendants:—

Held, (1.) that the word "school" in the exception to the covenant against trade meant a school for the education of boys and girls, and that a school of music did not come within the exception, and its conduct was a breach of covenant; (2.) that the property was not subject to a building scheme as defined in *Elliston* v. *Reacher* [1908] 2 Ch. 374, 384. There was no proof that, at the time of the sale to P., there was any plan in existence showing a definite lotting. The question whether two or more houses might be built on any plot was left in uncertainty. The estate was divided into two parts in which the covenants were somewhat different, and its exact division was not predetermined in the original layout, but left to individual contract.

Although the plaintiffs' and defendants' houses were both built on the same original plot, each party would, having regard to the form of the conveyances to them, have been entitled to enforce such covenants against the other, if a general building scheme had been proved to exist.

Knight v. *Simmonds* [1896] 1 Ch. 653 and *King* v. *Dickeson* (1889) 40 Ch. D. 596 discussed and distinguished.

ACTION.

The plaintiffs, Frederick Geoffrey Lawrence, Edmund Roy Lawrence and Tudor North Lawrence, the owners in fee of No. 14, Montpelier Crescent, Brighton, claimed against South County Freeholds, Ld., the Montpelier School of Music, and Miss Mary Elsie Darley, who were respectively the owners in fee and the lessees of No. 13, Montpelier Crescent, an injunction to restrain the second and third defendants from carrying on the business of teachers of music and dancing in such a manner as to cause a nuisance to the plaintiffs, and as against the first defendants to restrain them from carrying on or suffering to be carried on the business of teachers of music and dancing, or the letting out of rooms for that purpose in breach of a restrictive covenant not to carry on any trade or business whatever on the premises excepting that of a school or seminary, surgeon or apothecary.

During the hearing of the action his Lordship held that the school of dancing was so conducted by the second defendants as to be a nuisance to the plaintiffs and granted the appropriate relief, but as the tenancy of No. 13 had come to an end he held that an injunction was unnecessary.

The following statement of facts is taken from the judgment of the learned judge.

The story begins on May 17, 1843, when Thomas Budgen conveyed to Thomas Wisden (together with other lands) a plot of land at Brighton measuring 6 acres 2 roods 37 perches, bounded, as appears from the plan annexed to the conveyance, on the north by Montpelier Road, on the east by Dyke Road, on the south by a new road from the railway station, and on the west by the road to Blatchington, afterwards called Clifton Hill. The plot was of an irregular shape, being some 870 feet long on its north side, and narrowing to 566 feet on its south side. There were then no buildings on it. It was this plot which Wisden forthwith proceeded to develop, but it is part, and part only, of it that the plaintiffs claim to be comprised in a building scheme.

It is unfortunate that, owing to the lapse of time and loss of documents, there is no evidence of the circumstances in which the development took place. The plaintiffs have not been able to prove that there was any office where intending purchasers could see a plan of the estate nor, though, as will presently appear, there was some kind of ground plan, that there was a plan which indicated the several lots plotted out with a statement showing what lots would be subject to what restrictions. Nor, though I can now see how in fact the whole area was developed, have I any information why it was so developed. Nothing appears on the documents to explain the curious irregularity of the areas subject to different covenants, nor have I any information about a substantial part of the area originally purchased—namely, the south-western corner of it facing on Station Road and Clifton Hill—except that as early as April 20, 1844, part of it was sold by Wisden to Edmund Vallance and William Catt, the purchasers binding themselves by no restrictions, but the vendor entering into a covenant that the trade, business or calling of a tavern-keeper, or hotel-keeper, or inn-keeper, or beershop-keeper should not at any time thereafter be carried on in any messuage, tenement or building then erecting or which might be erected on the residue of the land therein described, meaning thereby the residue of the land originally purchased from Budgen. The plaintiffs, however, if I understand their contention, excluded this south-western area, if I may so call it, from their scheme. At one time I thought that they wished also to exclude from it the parts of any plot itself fronting on Montpelier Crescent which abutted on Dyke Road or Station Road and were subject to different restrictive covenants. But, if there was a scheme, I see no ground for such exclusion.

It is, as I have said, easy to see how the area was in fact developed. Reference may be made first to the plan annexed to the conveyance of May 6, 1844 (Wisden to Childens and Cheesman), secondly to the Ordnance Survey (1875 ed.), and thirdly to a plan prepared by the plaintiffs for the purpose of these proceedings showing conveniently the layout of Montpelier Crescent, with different colours for the areas of the several plots which were subject to different covenants, the area which I have called the south-western area being left uncoloured. From these and other plans on the documents and from the documents themselves I am left in no doubt that it was from the outset Wisden's plan to form a crescent of houses of more or less uniform design, with the usual gardens or lawns between the houses and Montpelier Road, and to exact from the several purchasers or lessees similar covenants restricting their user.

Having, as I have already stated, purchased the property in May, 1843, he entered into an agreement on December 12 of the same year with one Richard Stone, to which reference must be made because it is much relied on by the plaintiffs. That agreement recites Wisden's seisin of " a piece of land near "the Montpelier Road in Brighton aforesaid on which it is "intended to form a crescent to be called Montpelier Crescent "in the form and manner particularly set forth on a ground "plan thereof which is identified with the signatures of the "parties hereto respectively." It recites that Wisden has agreed to grant to Stone a lease of the piece of ground distinguished by the name " Richard Stone " on the said ground plan, and containing in width in the front and next the foot pavement sixty-two feet or thereabouts, and so on. Then Stone agrees to build on the said plot two messuages, spending on each 600*l.* at least, with regulations as to building line and such matters, and Wisden agrees, on the completion of the

SIMONDS J.

1939

LAWRENCE v. SOUTH COUNTY FREEHOLDS, LD.

buildings, to grant him a lease of the messuages so built together with the use in common with other persons to whom he may grant the use thereof of the lawns and pleasure ground in front of the said houses. It is then agreed that every such lease shall contain covenants by Stone for repair, insurance, payment of a contribution to the expense of making the lawn and pleasure ground, for observance of the building line, a covenant (which is, I think, of some importance) not to build on the ground at the back of the messuages to be built and between them and the Dyke Road any dwelling-house of less value than 250*l.*, and that any building which should at any time be erected on the said ground should not be used for public livery stables or for cowsheds or as a publichouse or beershop, and then the covenant (which is similar to that on which the plaintiffs sue) not to carry on or permit to be carried on on the premises by such lease demised or on any part thereof any trade or business whatsoever, excepting only that of a school or seminary, surgeon or apothecary.

It was further agreed that the lease should contain an option for purchase as therein mentioned, and that in the event of purchase the purchaser should enter into a deed of covenant with the vendor which should contain (inter alia) covenants restrictive of the user both of the land at the back and of the whole of the premises demised similar to those to be contained in the lease. Finally, the agreement contained a term, on which great reliance was placed by the plaintiffs, whereby Wisden for himself, his heirs and assigns, declared and agreed that for the purpose of building and completing the said crescent conformably to the said plan and for maintaining the uniformity and regularity thereof when completed, every agreement, lease and conveyance of the remaining ground fronting into the said crescent which should be entered into and made by Wisden, his heirs and assigns, should contain similar stipulations and agreements for ensuring uniformity in the range of the messuages to be erected in the said crescent, and the use of the ground and otherwise as therein mentioned, and that a similar deed of covenant should on every purchase be entered into by such purchaser as was thereafter provided for, and the same regulations and restrictions as to such ground as should be retained and built on in the said intended crescent by Wisden, his heirs and assigns, should be observed by him or them.

Before I make any comment on this agreement I must pass on to an agreement indorsed on it on October 30, 1844, and made between the same Wisden and Stone and one William Lambert, whereby it was agreed that three houses instead of two should be built on the ground comprised in the agreement, two of them by Stone and the third by Lambert. Certain variations as to rent and other matters were made, but otherwise the parties agreed to observe and perform the provisions and stipulations of the principal agreement. In due course the houses were built, and two of them, which can be identified as Nos. 26 and 28, Montpelier Crescent, were conveyed to Stone or his appointee, and the third of them, No. 27, to Lambert.

In the meantime, on August 22, 1844, an agreement had been made between Wisden and one John Packham, through whom both the plaintiffs and the defendants derive title. This was an agreement for sale of " All that piece or parcel "of land or ground in the intended Montpelier Crescent in "Brighton aforesaid which is distinguished on the ground "plan of the said intended crescent (identified with the "signatures of the parties hereto) by the name ' Packham ' "written thereon and containing the several quantities of "land therein mentioned and abutting and bounding as "delineated and distinguished on the said ground plan " for the sum of 450*l*. It provided for the execution by Packham of a deed of covenant which was to be noticed in the conveyance so as to cause the same to run with the land and to bind Packham and all future owners and occupiers thereof so far as the rules of law or equity would allow, and it was agreed that the deed of covenant should contain covenants by Packham not to erect any buildings on the said land other than messuages or dwelling-houses to the value of 600*l*. at least, that the said messuages should be built fronting to the lawn in front of the crescent and range in a line with the other messuages to be erected in the crescent and as shown on the said ground plan, with provisions as to the line of such buildings, that he would erect and complete fit and proper for occupation messuages and dwelling-houses of the value and in manner aforesaid before a certain date, that the messuages should not after completion be altered and should in case of damage by fire be rebuilt, and then, after a covenant I need not refer to, a covenant that no trade or business (except only that of a school or seminary, surgeon or apothecary) should be carried on on the said land or in the messuages to be erected thereon, and that the same messuages should not be used other than as private dwelling-houses or lodging-houses or for the purposes before mentioned. There was then a covenant to make certain contributions for upkeep of the lawn—namely, 1*l.* 10*s.* in respect of each messuage if there should be three messuages, and if only two messuages then 2*l.* 5*s.* in respect of each messuage.

In due course three houses were built on the plot of land which can be identified as Nos. 13, 14 and 15, Montpelier Crescent.

A consideration of these two agreements reveals that the original intention with regard to the first plot was to build two houses on it, and this was changed to three, and that in respect to the second plot no intention or agreement as to the number of houses is expressed, but it may be inferred that the purchaser might at his option erect two or three houses. It will be further observed that, in his agreement with Packham, Wisden did not enter into any obligation similar to that in his agreement with Stone that he would require other purchasers to execute similar deeds of covenant, and also that in this agreement the whole of the plot is subject to a single covenant as to user. There was no separate covenant with regard to the land at the back as there was in Stone's agreement, and this was because the plot abutted at the back, not on Dyke Road, or Station Road, but on what I have called the south-western area. [His Lordship then examined a number of other agreements entered into by Wisden, and proceeded :]

I have now referred to all the agreements which have been put in evidence. They do not cover the whole area, but, as will presently appear, even where agreements are lacking, it is made plain by conveyance and deeds of covenant how the whole area was in fact developed.

It is possible to refer only to a few conveyances. On May 6, 1844 (that is, before the date of any of the agreements I have seen except Stone's agreement), Wisden conveyed to Childens and Cheesman two parcels of land very fully and elaborately described by definition and reference to the plan annexed thereto, subject to the covenants, conditions and stipulations contained in an indenture of even date therewith. Wisden thereby covenanted that for the purpose of building and completing the crescent conformably to the intended plan and for maintaining the uniformity and regularity thereof when completed every agreement, lease and conveyance of the remaining ground in the intended crescent which should be entered into by Thomas Wisden, his heirs or executors, should contain stipulations similar to those contained in the indenture of covenants of even date, and that the respective lessees or purchasers should enter into like covenants for ensuring uniformity in the range of messuages to be erected in the crescent, and other matters therein mentioned. There was a covenant that Thomas Wisden, his heirs and assigns, should be subject to the same stipulations and restrictions in respect of such pieces of ground as should be retained and built on by them, and further that Thomas Wisden, his heirs and assigns, so long as they should retain possession and ownership of the piece of land abutting on the north or north-west (meaning surely to the south or south-west) to the land thereby conveyed or lying between the same and the new road to the railway station would not erect or permit any public livery stables, slaughter-house or cowshed, or erect any house thereon of less value than 250*l.* Finally, that when and in case he or they should sell or demise the said piece of land lying between the land thereby conveyed and the last-mentioned road or any part thereof (except the land sold or demised to Messrs. Catt) he or they would require the purchasers or lessees in their respective conveyances or leases or deeds of covenant to enter into similar stipulations for preserving the respectability of the neighbourhood. The plan annexed to the conveyances indicated the broad features of Montpelier Crescent and the parcel conveyed, but did not contain any information as to the number of plots or the method of plotting. On these parcels of land so conveyed were erected the six houses, Nos. 7 to 12, Montpelier Crescent. I defer reference to the deed of covenant mentioned in this conveyance until I have referred briefly to the other material conveyances.

It will be remembered that Wisden had on August 22, 1844, entered into an agreement with Packham through whom both plaintiffs and defendants derive title. On July 31, 1845, effect was given to this agreement by a conveyance by Wisden to Packham of a parcel of land therein described and delineated on the plan drawn on the back thereof "With the three several "messuages or dwelling-houses and other buildings then in "course of erection on the said piece of land or on some part "thereof and respectively numbered or intended to be num-"bered (blank) and (blank) in Montpelier Crescent." The conveyance contained, among other provisions, a covenant by Wisden that he, his heirs and assigns, would at all times permit the lawn in front of the intended crescent to be used as and for a pleasure ground only and, further, a covenant similar to that contained in the conveyance to Childens and Cheesman with regard to procuring the execution of similar deeds of covenant for the purpose of building and completing the crescent conformably to the intended plan and for maintaining the uniformity and regularity thereof when completed. Wisden did not enter into any covenant with regard to the land at the back between the land conveyed and Station Road. The plan annexed to the conveyance shows only the parcel of land conveyed with the parcel adjoining it on each side. On the same day Packham entered into a deed of covenant to which I will refer later. On the next day, August 1, 1845, Packham conveyed to William Russell and Samuel Russell a strip of land which appears to have been as nearly as possible one third of the land comprised in the conveyance of July 31, 1845, with the messuage in course of erection on it. From a recital in the conveyance it is made plain that the purchasers had notice of the deed of covenant entered into by Packham on the preceding day and the restrictive covenants therein contained, but they entered into no covenants with Packham, and Packham did not enter into any covenants with them with regard to this other part of the land which he had purchased from Wisden, or assign to them expressly at least the benefit of any covenant entered into by Wisden. The property comprised in this conveyance is that now known as No. 14, Montpelier Crescent, of which the plaintiffs are the owners.

On the same date, August 1, 1845, by a conveyance in every material respect comparable with that of No. 14, Packham conveyed to Thomas Smith the property now known as No. 13, Montpelier Crescent, of which the defendants are the owners. The property also was as nearly as possible an equal third of the property comprised in the conveyance by Wisden to Packham of July 31, 1845. The remaining one-third of the same property comprising No. 15, Montpelier Crescent, was on October 30, 1846, conveyed by Packham to one Crosier by a conveyance which also was, so far as is relevant to any question which I have to decide, in terms strictly comparable with those of Nos. 13 and 14.

I pause at this point in a long narration of facts to observe that here arises the final question which I have to decide—namely, whether, assuming in the plaintiffs' favour a general building scheme, there was such a relation between the Russells, Thomas Smith, and Crosier, all of them claiming under Packham, as to entitle each of them to enforce against the others the covenant into which Packham had entered. I defer the consideration of this question to a later stage.

None of the other original conveyances of land in Montpelier Crescent has been produced, though I get some information of the contents of some of them from the deeds of covenants to which I next refer. It appears from these deeds of covenants that in the case of every conveyance of land in Montpelier Crescent, except of Nos. 1 and 2 (the houses at the north-west of the crescent), Wisden or his successors in title required and obtained from his purchasers the execution of a deed of covenant. [His Lordship then referred to several of these deeds and continued :]

The other deeds of covenant were in terms which exhibited only the following differences : first, where as was sometimes the case the houses had already been completed, there was some variation in the form of the covenant ; and, secondly, there was some variation in the amount to be paid by way of contribution to the upkeep of the garden. Thirdly, in every case, where the parcels conveyed back not on the south-western area but on Dyke Road or Station Road, and where, accordingly, in the plan annexed to the deed of covenant the main part of the land was coloured blue and the other part of it abutting on either of those roads was coloured yellow, the covenant as to user was in a double form ; the covenant in respect of the part coloured blue being, as I have already stated it, but that in respect of the part coloured yellow being not to build thereon any messuage of less value than 250*l.*, and not to carry on thereon the trade, business or calling of a tavern-keeper or hotel-keeper, an inn-keeper or beershop-keeper, or a public livery stable keeper, nor sell or permit to be sold thereon any wine, beer, ale or spirituous liquor, nor use any building or shed thereon as a slaughter-house or cowshed. Fifthly, whether designedly or by error, the value of the houses Nos. 13, 14, and 15 was to be 500*l.* each instead of 600*l.* as in every other case. Sixthly, in respect of No. 37, the covenant in respect of the user of the yellow land was expanded so as to cover any noisy, noisome, offensive or dangerous trade or business whatsoever. This, it may be noted, was of a much later date, for the deed was not executed until 1899.

F. R. Evershed K.C. and *Raymond Jennings* for the plaintiffs. The plaintiffs are entitled to enforce the restrictive covenants on the basis of a building scheme. The case is within *Elliston* v. *Reacher* (1), as it complies with all the four conditions of a building scheme as there defined. It does not matter if the plots into which the estate is divided are not all laid out, so long as there is a clear intention that the covenants shall bind all purchasers and are intended for the benefit of the estate generally: see *Reid* v. *Bickerstaff*. (1)

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(1) [1908] 2 Ch. 374, 655.

If the first three points laid down in *Elliston* v. *Reacher* (2) are clearly established, the fourth may be readily inferred, provided that the purchaser has notice of all the facts constituting the first three points. An estate need not be laid out for sale all at one time; there can be successive sales, as here, and the purchaser can only enforce the restrictions as to the lots shown on the plan at the date he bought: *Rowell* v. *Satchell*. (3) There was an original lotting brought to the notice of every purchaser. Each purchaser entered into his covenants for the benefit of the entire property comprised in Montpelier Crescent.

The first defendants had notice that No. 14 was being let for the purpose of a school of music and dancing and this was a breach of covenant which they have suffered. A school of music is not within the exception of "school or seminary," which refers only to a school for the education of children.

[*Kelly* v. *Barrett* (4) was also referred to.]

A. Grant K.C. and *Roger Turnbull* for the first defendants. The plaintiffs have not pleaded that the property is bound by a building scheme, but in any case we submit that there was no building scheme, as now understood.

The development of the property began in 1844. At that time no person not a party to a conveyance could take any benefit under it. A deed executed before October 1, 1845, when the Real Property Act, 1845, came into force cannot be brought into any building scheme.

Therefore at that date, building schemes properly so called were unknown. The only way in which covenants could then be effectually imposed on land sold to different purchasers was by a deed of mutual covenant to which all the purchasers were made parties. Another method, afterwards adopted, was a trust deed vesting the right to enforce restrictive covenants in trustees for all the purchasers: see Jolly on Covenants, p. 54.

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(1) [1909] 2 Ch. 305.

(2) [1908] 2 Ch. 374, 655.

(3) [1903] 2 Ch. 212.

(4) [1924] 2 Ch. 379.

The first idea of a building scheme is to be found in *Tulk* v. *Moxhay* (1), but the doctrine there laid down was limited in *Haywood* v. *Brunswick Permanent Benefit Building Society* (2) holding that no liability under a restrictive covenant could compel the spending of money on property.

A restrictive covenant creates a quasi-easement: *Renals* v. *Cowlishaw.* (3) The earliest case in which the building scheme proper appears is *Spicer* v. *Martin.* (4) A building scheme is something which emerges from the plan in which the property is developed. The rights created by a building scheme are not conferred by contract between the parties. There must therefore be exactly defined (1.) the parties bound, (2.) the area, and (3.) the covenants. Every purchaser must know the exact area over which the building scheme prevails. In *Kelly* v. *Barrett* (5) and *Reid* v. *Bickerstaff* (6) the scheme put forward failed, because there was no definite plan. There must be full knowledge and acceptance of the position of being a member of a band of purchasers. Here Wisden, the original purchaser, was not a party to any of the subsequent deeds, with two exceptions. There is a reference to a ground plan of the property, but none to any plan showing the plotting. There must be a definite plotting of the area to be subject to the scheme before the property is put on the market; *Kelly* v. *Barrett* (5); *Osborne* v. *Bradley* (7) per Farwell J. There is no such plan in this case.

As between sub-purchasers of a plot the covenants are not binding, even if other purchasers are bound: *King* v. *Dickeson.* (8) Here both the plaintiffs and the defendants were owners of part of one plot, lot 258 at the original sale, and the purchasers could not bring actions inter se.

A building scheme was first defined in *Spicer* v. *Martin.* (4) The House of Lords took an entirely new line in that case: see Lord Fitzgerald's judgment.

The word "school" is used in its general sense, and so used covers a school of music and a school of dancing. The

(1) (1848) 2 Ph. 774.
(2) (1888) 8 Q. B. D. 403.
(3) (1878) 9 Ch. D. 125.
(4) (1888) 14 App. Cas. 12.
(5) [1924] 2 Ch. 379.
(6) [1909] 2 Ch. 305.
(7) [1903] 2 Ch. 446.
(8) (1889) 40 Ch. D. 596.

word "seminary" means any place of education, a school or college. The expression "seminary for young ladies" was commonly used of girls' schools in the earlier part of the nineteenth century, but the word cannot be restricted to a school for children.

Evershed K.C. in reply. If a school of music is included in the exception to the covenant, then any kind of school, such as a school of musketry, or of motoring, is permissible. The words "school or seminary" in the year 1845 meant boys' school or girls' school.

The Act of 1845 relied on by the defendants has no relation to the assigns of a covenant.

In *Renals* v. *Cowlishaw* (1) the learned Vice-Chancellor (Hall V.-C.) referred to three cases, all dealing with covenants dated before 1845, as the foundation for the proposition he there stated. The decision in *Spicer* v. *Martin* (2) was not cited in *King* v. *Dickeson* (3), decided shortly afterwards.

It is not necessary, to establish the validity of a building scheme, that every purchaser should have notice of the complete plotting.

The collocation of the words "school or seminary" shows that the words are to be confined to schools for children, "school" referring to a boys' school, and "seminary" to a girls' school.

[*Child* v. *Douglas* (4) was also referred to.]

Cur. adv. vult.

1939. April 20. SIMONDS J. The plaintiffs, Frederick Geoffrey Lawrence and Edmund Roy Lawrence, as legal personal representatives of their mother, Lilian Kate Lawrence, who died on April 2, 1936, are the owners in fee simple of a messuage known as No. 14, Montpelier Crescent, Brighton, Sussex. They are, with their brother, the third plaintiff, Tudor North Lawrence, beneficially entitled to the said messuage of which they have been in possession and occupation since the death of their mother.

(1) 9 Ch. D. 125.
(2) 14 App. Cas. 12.
(3) 40 Ch. D. 596.
(4) (1854-56) Kay, 560, 569; 5 D. M. & G. 739.

The first defendants, South County Freeholds, Ld., are the owners in fee simple of a messuage immediately adjoining the plaintiffs' messuage, and known as No. 13, Montpelier Crescent, of which the second and third defendants, the Montpelier School of Music and Mary Elsie Darley, were at the time of the issue of the writ tenants or sub-tenants and occupiers. Against the second and third defendants the plaintiffs claimed an injunction to restrain them from carrying on on the said premises the business of teachers of music and dancing in such manner as to cause a nuisance to the plaintiffs as occupiers of No. 14. I have held that in this respect their claim was well founded, and have granted the appropriate relief. It was unnecessary to grant an injunction as on the hearing their tenancy of No. 13 had been determined. It remains to consider the position as between the plaintiffs and the first defendants, to whom I will hereafter refer as the defendants. Against them the plaintiffs claim an injunction to restrain them from carrying on or from suffering to be carried on on No. 13 the business of teachers of music and dancing, or the business of letting out rooms therein for the purpose of music and dancing being taught or practised thereat, or for certain other purposes, or for any trade or business whatsoever (excepting only that of a school or seminary, surgeon or apothecary) or from using the said premises or permitting the same to be used other than as a private dwelling-house or lodging-house (except for the purposes aforesaid) in breach of certain covenants contained in a deed of covenant dated July 31, 1845, and made between John Packham of the one part and Thomas Wisden of the other part.

To succeed in their claim the plaintiffs must establish (1.) that the premises No. 13 have been so used as to contravene the covenants in question, (2.) that the defendants have themselves so used, or suffered such user of, the premises, (3.) that the defendants are bound by the said covenants, and (4.) that the plaintiffs are entitled to sue on the said covenants.

It will serve to some extent to narrow the issues if I deal first with the second point. The defendants have not themselves used the premises in such a way as to commit a breach of covenant, the only question being whether they have suffered such user. Having considered the documentary evidence and heard the oral evidence of the defendant, Mrs. Darley, and of Mr. Bailey, the defendants' representative and agent, I am satisfied that the defendants did not at any time suffer the use of the premises for any other purpose than that of a school of music, whatever that may involve. They were in fact used for dancing lessons and other purposes which could not, in my judgment, be assumed to be covered by the expression " school of music," but I hold on the facts that the defendants neither knowingly let them for any other purpose than a school of music, nor subsequently refrained from taking any steps which they could or ought to have taken to stop such user. Accordingly they did not suffer the user of the premises for any other purpose than that of a school of music. That they did let the premises knowing that they were to be used for a school of music they themselves admit, and they must accordingly admit that if such user is prohibited by the covenant they have been guilty of a breach.

The first question, then, resolves itself into one which can be shortly stated—namely, whether the carrying on of a school of music on the premises is the carrying on of any "trade or business whatsoever excepting only that of a school "or seminary, surgeon, or apothecary" ; or, more shortly, is the carrying on of a school of music the carrying on of a school within the meaning of this covenant ? The plaintiffs contend that in its context the word " school " has what I have little doubt is its primary and natural meaning—namely, a place where boys and girls receive instruction and discipline. That is the meaning which it bears in its most familiar compounds—schoolboy, schoolgirl, schoolmaster. On the other hand, it is urged that so long as an institution is called a school, then it is a school within the covenant. It is immaterial what addition is made to the title, what is the subject-matter taught, or what the age or condition of the pupils. A school is a school, whether it is a school of music, of dancing, of motoring or musketry. Between those contentions I have no hesitation in adopting that of the plaintiffs. Not much help is to be got from the context, though there is some ground for thinking that in a document of the first half of last century the word "seminary" may in the collocation of "school or seminary" have been intended to mean a school for girls, "school" being confined to school for boys. I do not, however, rest my decision on this, but rather on what appears to be the ordinary meaning of the word, and on the fact that the addition to the word "school" of further words of description "of music," "of dancing," or as the case may be, indicates that the ordinary meaning is in some way being qualified or extended. There appears to me to be no sufficient reason for admitting any such qualification or extension in what are after all words of exception, and therefore words which must be strictly construed.

On the first two points, then, I am of opinion that the defendants have committed a breach of the restrictive covenant by suffering the user of No. 13, Montpelier Crescent, as a school of music.

On the third point there is no difficulty. The defendants do not question that they are bound by the restrictive covenant, subject always to the question who can sue them on it.

On the fourth point, whether the plaintiffs are entitled to sue the defendants on the covenants in question, it will be necessary to examine in detail the circumstances in which they were entered into. At the outset it may be said that two questions will be found to be involved: first, the now familiar question whether the plaintiffs' and the defendants' premises were comprised in what is called, in a technical and special sense, a building scheme; and, secondly, whether, assuming that question to be decided in their favour, the plaintiffs can in the special circumstances of this case sue the defendants on the covenants. It is now nearly one hundred years ago that the transactions took place which I have to investigate. It is not surprising that some documents, which might be material, are not to be found, and that some facts which it is important to prove are left to conjecture.

SIMONDS J.
1939
LAWRENCE v. SOUTH COUNTY FREEHOLDS, LD.

[His Lordship then stated the facts and material documents relating to Montpelier Crescent, as above, and proceeded :] I have not, I hope, omitted in this narrative any material fact bearing on the question whether there was a building scheme binding inter se the several purchasers of the several plots in Montpelier Crescent and persons claiming through them respectively.

The essentials of such a scheme, as stated by Parker J. in *Elliston* v. *Reacher* (1), which has been followed in many recent cases, e.g., *Reid* v. *Bickerstaff* (2) and *Kelly* v. *Barrett* (3), are, first, that the plaintiffs and defendants derive title under a common vendor ; secondly, that before selling the land to which the plaintiffs and the defendants are respectively entitled the vendor laid out his estate or a defined portion thereof including the plaintiffs' and the defendants' land for sale in lots subject to restrictions intended to be imposed on all the lots and consistent only with some general scheme of development ; thirdly, that these restrictions were intended by the vendors to be, and were, for the benefit of all the lots sold ; and, fourthly, that both plaintiffs and defendants or their predecessors in title purchased their lots from the vendor on the footing that the restrictions subject to which the purchases were made were to enure to the benefit of the purchasers of the other lots included in the general scheme.

The first condition is here satisfied. It is only on the final question that it is material that the plaintiffs and defendants had a common ancestor in two generations.

The second, third, and fourth conditions to some extent overlap. There must be a defined area laid out for sale in lots. I will assume in favour of the plaintiffs that it is the area covered by Nos. 1 to 38, Montpelier Crescent, including, since it cannot on any ground be excluded, that part of the several plots which was coloured yellow on the plans annexed to the several deeds of covenants. Was this area before the sale to Packham, which I take as August 22, 1844, the date of the agreement for sale, laid out for sale in lots subject to

(1) [1908] 2 Ch. 374, 665.
(2) [1909] 2 Ch. 305.
(3) [1924] 2 Ch. 379.

restrictions intended to be imposed on all the lots? At this point I think that the plaintiffs' case breaks down. I cannot as a matter of strict proof, or even as a matter of reasonable inference and conjecture, find that the defined area was ever so laid out. That there was some ground plan showing the layout in a general way is evident, but I think that the evidence points against rather than in favour of any plan which showed the whole area and the way in which it was lotted. I have already pointed out how in certain cases the number of houses to be built on a parcel comprised in one sale was left in uncertainty, and if I had to hazard a guess I should be inclined to say that Wisden, having formed a general plan, was content to sell off parcels of varying sizes according to the requirements of his purchasers, leaving it as yet undetermined how many houses were to be built on each parcel, and therefore how many separate lots might ultimately be formed. In the same way, I should conclude that the areas to be coloured respectively blue and yellow of the parcels abutting on Dyke Road or Station Road were not predetermined in any original layout, but were the subject of individual bargaining in each case. I cannot in any other way account for the irregularity of the proportions of blue and yellow. The importance of clear evidence of an original layout in building plots has been repeatedly asserted: see, for example, per Warrington L.J. in *Kelly* v. *Barrett* (1), and per Farwell L.J. in *Osborne* v. *Bradley* (2). In this very artificial branch of the law it is, I think, undesirable to seek to qualify such authoritative statements by fine distinctions. It may, no doubt, be urged that, even without a division of the building estate into plots, there may be sufficient evidence of a building scheme, and I do not wish to rule out some exceptional case. It is sufficient to say that in the circumstances of the present case I see no adequate reason for departing from the established rule.

If, however, I am wrong on this point, and the condition of layout of the estate for sale in lots subject to restrictions intended to be imposed on all the lots is satisfied, I should feel some doubt whether the third or fourth conditions were

(1) [1924] 2 Ch. 405.

(2) [1903] 2 Ch. 446, 453.

satisfied. It is no doubt true that in some cases, though by no means in all, the vendor at the time of sale represented that there would be similar restrictions affecting all the land in Montpelier Crescent, and went so far as to bind himself that there should be such restrictions; and it is true that in every case there were in fact similar restrictions with such variations only as I have pointed out. From this it is a short step to the inference that the vendor intended the restrictions to be for the benefit of all the lots sold, and that it was on this footing that the several purchases were made.

To this view, however, there are certain objections. The transactions with which we are concerned began in 1843, that is, many years before the modern doctrine of a building scheme had first been stated. In truth, the first hint of that doctrine is, I think, to be found in the judgment of Lord Romilly M.R. in *Western* v. *Macdermot* (1), but already by 1843 the device was well known of securing the same result by means of deeds of mutual covenants whereby the vendor and the purchaser of every lot were brought into immediate contractual relation with each other, or alternatively by means of vesting the restrictive covenants in the vendor or in third parties as trustees for all persons from time to time entitled to the several lots, a matter described by Shadwell V.-C. in 1839 as "perfectly familiar to the "mind of every lawyer": see *Schreiber* v. *Creed*. (2) It is, I think, a matter entitled to some consideration that the vendor, Wisden, did not adopt either of these expedients, but took separate covenants from each purchaser so that the purchasers were not brought into legal relation with each other. If an intention is to be ascribed to the vendor, it is surely possible that he had no other than to enhance the price of what he sold by promising to impose restrictions on other purchasers, and that he did not intend to assign, as he did not in fact assign, and that he was not a trustee of, as he did not in fact declare himself to be a trustee of, the benefit of any restrictive covenant entered into by one purchaser to or for any other purchaser. I feel a considerable difficulty

(1) (1865) L. R. 1 Eq. 499.

(2) (1839) 10 Sim. 9, 33.

in ascribing to Wisden an intention which, if it was to be effective, rested on a doctrine then unborn which was hinted at twenty years later by Lord Romilly, but only found its full deliverance in the speech of Lord Macnaghten in *Spicer* v. *Martin*. (1)

A further difficulty is that which I have already pointed out, but here, also, has its relevance. Not only were the several purchasers not brought into legal relation with each other but they had no means in the absence of a lotted plan of knowing who or how many the other purchasers would be, or what would be their holdings. Here, again, I find some difficulty in the attribution either to the vendor or to any purchaser of the intention that all the purchasers unnumbered and unknown and persons claiming through them should have against each other the right to enforce their respective covenants. And in particular I find a difficulty in assuming any such intention with regard to the yellow land and the persons from time to time entitled thereto.

Holding as I do that the plaintiffs, on whom the burden lay, have not established that there was a general building scheme covering the plaintiffs' and the defendants' land, it is not strictly necessary to determine the final question—namely, assuming a general building scheme, so that Packham and Beedham and Christmas and all the other purchasers and all persons claiming through them could inter se enforce the restrictive covenants, what is the position inter se of the plaintiffs and the defendants both of whom claim through the original covenantor and purchaser, Packham ? But since the question has been fully argued, it is desirable that I should state my views on it. The question is : Can the plaintiffs and defendants mutually enforce against each other the covenant into which Packham entered in respect of both their houses ? Both of them took with notice of the restrictive covenants, so that, on the assumption which I have made, Beedham (say) or Christmas could have enforced the covenants against either of them. I will assume further that not only Beedham (say) but the numerous purchasers of the plots into which the parcels bought by him were carved had the same rights against the several purchasers of the plots into which Packham's parcel was carved.

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(1) 14 App. Cas. 12.

But on the position inter se of the persons claiming through Packham these assumptions do not lead to any conclusion. Of authority on the point there is little. In *King* v. *Dickeson* (1) one who had purchased a lot on the sale of a building estate, where the vendor and the several purchasers had entered into a deed of mutual covenant, mortgaged part of his lot. The mortgagee had notice of the restrictive covenants but entered into no covenant with his mortgagor. He afterwards foreclosed and later sold the mortgaged land, part of which became vested in the defendants who took with notice of the restrictive covenant. North J. held that the mortgagor could not as against the defendants enforce the restrictive covenants; the mortgagee and those claiming through him took the mortgagor's land subject to all the rights imposed on the land by the mortgagor's covenant, but the mortgagor did not by implication create as against the mortgagee any new right or obligation in his own favour. I think, though North J. does not use the words, that he would have regarded the assertion of any such right as a derogation by the mortgagor from his grant. This decision was in March, 1889; the judgment in *Spicer* v. *Martin* (2) which had been given in the previous December appears not to have been cited.

In *Knight* v. *Simmonds* (3) an estate had been laid out and sold in lots under a building scheme. The purchasers of certain lots, for convenience called "the green estate," subsequently sold them in smaller plots, and by deed of mutual covenant they and their sub-purchasers entered into a series of restrictive covenants intended to govern those lots. These covenants, though in substantial accordance with the original covenants governing the whole estate, differed in one essential feature—namely, that whereas under the original covenant no trade or business might be carried on on the estate, under the covenant in the deed of mutual covenant this was modified so that only those businesses were prohibited which were noisy, noxious, dangerous, or offensive to the neighbourhood, or to the owners or occupiers of the green estate. It was held by Romer J. that though the sub-purchasers of lots forming part of the green estate, taking with notice of the original covenants, could be compelled to observe them at the suit of the owner of any part of the original estate other than the green estate, yet inter se they were governed only by the substituted covenants in the deed of mutual covenants. In other words, there was a sub-scheme with a new local law which prevailed over the original scheme with its local law. The case went to the Court of Appeal but not on this point. From this case I get little to help me to a decision in a case where there is no substitution of new covenants for old, and therefore no inference that the covenantors being bound by the new covenants are not to be bound by the old. At the highest it can be said that Romer J. did not say that in any case the sub-purchasers would not be bound inter se by the original covenant.

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(1) 40 Ch. D. 596.

(2) 14 App. Cas. 12.

(3) [1896] 1 Ch. 653.

Next, *Elliston* v. *Reacher* (1) was cited on this part of the case, reliance being placed on the observations of Cozens-Hardy M.R. These can only be understood in the light of the facts of the case. The plaintiffs were (*a*) Elliston, and (*b*) certain persons who derived title to their lots through H. C. Cobbold. Parker J. held that Elliston was entitled to enforce the covenants into which the defendants' predecessors in title had entered, but that the other plaintiffs were not so entitled, because H. C. Cobbold, through whom they claimed, was also a predecessor in title of the defendants, and had joined in a conveyance of the land claimed by them, which, on its true construction, as the learned judge held, left the purchaser at liberty so far as the vendors were concerned, to deal with the property as he liked, subject only to his observing the covenants into which he then entered. The plaintiffs, then, could be in no better position than H. C. Cobbold, and could not enforce the original covenants against the defendants. This decision seems exactly in line with that of Romer J. in

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(1) [1908] 2 Ch. 665, 673.

SIMONDS J.

1939

LAWRENCE v. SOUTH COUNTY FREEHOLDS, LD.

Knight v. *Simmonds* (1). The unsuccessful plaintiffs did not appeal, but on an appeal by the defendants against the decision in favour of Elliston an argument was addressed to the Court on which Cozens-Hardy M.R. (2) said: "Then it "was argued, somewhat boldly, that the whole scheme was at "an end, if I follow the argument rightly, because of the four "lots which were purchased by Mr. H. C. Cobbold; so far "as appears, he was the only purchaser of the property; the "other deeds were not produced, and it was unreasonable to "suppose that there was any contract entered into between "Mr. Cobbold as purchaser of lot 26 and Mr. Cobbold as purchaser of lot 27. I cannot assent to that. I do not think "that is the true way to look at it. The very essence of every "scheme of this kind is that it does not depend on the fact of "there being separate purchasers of each lot, but it means that "each lot, into whosesoever hands it comes, whether into the "hands of the man who has bought half a dozen lots, or "originally to a man who has bought one lot from the vendor, "shall be subject in either case to the burden and have the "benefit of the restrictive covenant." I do not find it easy to follow the argument to which reference is made, either from the argument of counsel as reported or from the statement of facts in the Court of Appeal, or in the Court below. But, however this may be, it is clear that the point to which Lord Cozens-Hardy was directing his observations was not the relation inter se of sub-purchasers of parts of an original lot where they have themselves entered into no covenants with their vendor, or with each other, but the relation inter se of purchasers of different lots which had originally been acquired by the same purchaser. I should respectfully agree that in such a case it would be impossible, the other ingredients of a building scheme being present, to exclude it either in whole or in part because more than one lot was originally purchased by the same person. This is not the question in the case before me which, as it appears to me, raises a point never before discussed. It is one thing to say that the owner of a lot who disposes of part of it cannot himself insist on the observance of restrictive covenants unless his purchaser has covenanted to observe them—see *King* v. *Dickeson* (1)—or that as between several sub-purchasers a new local law supersedes an old local law: see *Knight* v. *Simmonds*. (2) In the former case the principle of derogation from grant and in the latter the maxim "expressum facit cessare tacitum" justifies the decision. It is quite another matter when it appears that the purchaser of an original lot subdivides it and disposes of the sublots without imposing any new burdens, but in such manner that the purchasers have notice of the old ones. The question then arises whether by the application or by the logical extension of the principle of *Spicer* v. *Martin* (3) the sub-purchasers are bound inter se by the old covenants. Is this a case in which "community of interest" requires and imports "reciprocity of obligation"? It is, I think, clear that it is only on this principle if at all that the sub-purchasers can be so bound. They have entered into no covenant with their vendor or with each other; he has entered into no covenant with them. It follows that none of them has assigned to him the benefit of a covenant by the others, nor has there been a covenant by any of them the benefit of which inhered in the land and without express assignment passed on the conveyance of it. Such a benefit may pass with the land to which it has been annexed, even though the purchaser is unaware of it (see *Rogers* v. *Hosegood* (4)), a hidden treasure which may be discovered in the hour of need, but it must first have been so annexed.

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(1) [1896] 1 Ch. 653.

(2) [1908] 2 Ch. 672.

The importance of this is made clear by an examination of the principle established in *Spicer* v. *Martin*. (3) In that case Lord FitzGerald said (5): "There, my Lords, is every ingredient in "this case from which we may reasonably infer an intention "that the lessees or purchasers were to be protected by and "have the benefit of the restrictive covenant as between "Spicer and the Commissioners and to be bound by a similar "obligation entered into by each on his own behalf," and, later: "I cannot entertain any reasonable doubt that, as

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(1) 40 Ch. D. 596.
(2) [1896] 1 Ch. 653.
(3) 14 App. Cas. 12.
(4) [1900] 2 Ch. 388.
(5) 14 App. Cas. 18.

"between the appellant and the respondent, the latter was, "according to right and justice" (a revealing phrase) "entitled "to the full benefit and protection of the restrictive covenant "which the vendor had entered into with the Commissioners." Lord Macnaghten (1) cited the well known passage from the judgment of Hall V.-C. in *Renals* v. *Cowlishaw* (2), and said that he would not be disposed to hesitate to extend the principles recognized in that case, but that they must apply to and govern the case before him. There are two sentences in the cited passage to which I would refer: "This right" (that is, the benefit of the covenant) "exists not only where "the several parties execute a mutual deed of covenant, but "wherever a mutual contract can be sufficiently established." The Vice-Chancellor at that stage rested the principle on contract and nothing but contract, express or implied. He went on: "A purchaser may also be entitled to the benefit of a "restrictive covenant entered into with his vendor by another "or others where his vendor has contracted with him that he "shall be the assign of it, that is, have the benefit of the covenant. "And such covenant" (surely this should be "contract") "may be collected from the transaction of sale and purchase." Here, too, it is clear that the Vice-Chancellor had nothing in mind except the creation and assignment of rights which were in their origin contractual, though ultimately they might assume the character of quasi-easements. But in the application of the principle of *Renals* v. *Cowlishaw* (2) to the case before him Lord Macnaghten used language which went far beyond it: "This restriction," he said, "was obviously for "the benefit of all the lessees on the estate; they all had a "common interest in maintaining the restriction. This "community of interest necessarily, I think, requires and "imports reciprocity of obligation."

It does not fall to me to decide whether Lord Macnaghten intended to establish a new equitable right independent of any original contract express or implied. That follows from what was said by Parker J. in *Elliston* v. *Reacher* (3) where, after stating that the implication of mutual contract is not always a perfectly satisfactory explanation, since the circumstances may often preclude the possibility of actual contract, he said : "and yet the equity may exist between them. It is, I think, "enough to say, using Lord Macnaghten's words in *Spicer* v. "*Martin* (1), that where the four points I have mentioned are "established, the community of interest imports in equity "the reciprocity of obligation which is in fact contemplated "by each at the time of his own purchase."

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(1) 14 App. Cas. 24, 25.

(2) 9 Ch. D. 125, 129.

(3) [1908] 2 Ch. 385.

This, then, is the equity on which the plaintiffs must rely, an equity which is created by circumstances and is independent of contractual obligation. It arises only where the four points he mentions are established. That means in the present case that they must be established not in relation to the estate as a whole (for that is for the purpose of this part of the case assumed) but in relation to the plots created by the subdivision of Packham's plot. The question may, I think, be put in this way : Was there in regard to this plot a sub-scheme which satisfied the four conditions ? Let me recapitulate the few relevant facts. Packham acquired his land on July 31, 1845, and entered into the contemporaneous deed of covenant under which he was bound, inter alia, to erect three houses on his plot. On August 1, 1845, he conveyed one-third of his plot with one house to the plaintiffs' predecessor in title and another third with another house to the defendants' predecessor. Of the other third he did not so quickly dispose, but he mortgaged it on August 11, 1845, and conveyed it on sale in October, 1846. All these purchasers had notice of the conveyance by Wisden to Packham and of the deed of covenant, and knew, therefore, among other things, of Wisden's covenant with regard to maintaining uniformity. They knew then that they were severally liable to have the restrictive covenants enforced against them by the owners of other parts of the estate against whom they might hope reciprocally to enforce them. This is the background against which I examine the four points.

First, then, both plaintiffs and defendants derive title from a common vendor, Packham. Secondly, before selling to either of them he had bound himself to build three houses on his land; this is the equivalent of division into three lots. He had further bound the land by restrictions subject to which he sold the three lots; this is the equivalent of imposing restrictions on them. The third and fourth conditions rest on the intention of the parties, which is to be gathered from all the circumstances. If, on the facts stated, the assumption of a general building scheme has been rightly made, it appears to me an irresistible inference that it was the common intention of Packham and of the purchasers from him that within the enclave comprising Nos. 13, 14 and 15, Montpelier Crescent, this same local law should prevail; there is no question here of a new local law as there was in *Knight* v. *Simmonds*. (1) If such was not their intention, then I must conclude that they intended, while competent to enforce the covenants against the occupiers of the remotest houses on the estate and liable at their suit to have them enforced, yet to be powerless with regard to the conduct of their nearest neighbours.

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(1) 14 App. Cas. 12.

To such a conclusion I should not willingly come, if any other is open to me. It appears to me that I can properly hold, as the logical application of the equitable rule stated in *Spicer* v. *Martin* (2) that there is in this case just that community of interest between the purchasers from Packham which creates reciprocal obligations between them. But as I have already pointed out, this conclusion rests on the assumption of a general building scheme. Without that assumption it would not be possible to lay the foundation for an application of the rule. Inasmuch as I have decided that the plaintiffs have not proved the general building scheme, my view on the final question will not help them. The action must as against the South County Freeholds, Ld., be dismissed, with costs.

Solicitors: *Kennedy, Lindo & Co., for Burt Brill and Edwards, Brighton; T. & N. Blanco White; Iliffe, Sweet & Co.*

H. L. L.

(1) [1896] 1 Ch. 653.

(2) 14 App. Cas. 12.

SIMONDS J.

1939

April 26.

In re WARREN.

PUBLIC TRUSTEE *v.* FLETCHER.

(938. W. 273.)

Trust—Investment clause in will—No exclusion of statutory investments—Powers of trustee—No expression of contrary intention—Trustee Act, 1893 (56 *&* 57 *Vict. c.* 53), *s.* 1—*Trustee Act,* 1925 (15 *Geo.* 5, *c.* 19), *s.* 69, *sub-s.* 2.

Under the will of a testator who died in 1880 the trustees were to invest his residuary estate upon certain American securities, and to appropriate these securities to the value of 35,500*l.* towards a settled legacy. In 1938 the Public Trustee was appointed trustee of the will, and at that date the legacy fund was not invested in any of the securities mentioned in the will but was invested in securities authorized by law for the investment of trust funds:—

Held, that the direction in the will was not the expression of any contrary intention within s. 69, sub-s. 2, of the Trustee Act, 1925, and the trustee could therefore invest the fund in any authorized security. The language of that sub-section has the same meaning and effect as the words " unless expressly forbidden " in s. 1 of the Trustee Act, 1893.

In re Owthwaite [1891] 3 Ch. 494 doubted and distinguished.

SUMMONS.

The facts were stated by his Lordship in his judgment as follows: In this case, the testator made his will on June 9, 1880, and died on October 10, 1880. The Public Trustee, who is the present trustee of the will, desires directions as to the investment of a fund of 35,500*l.* which was thereby directed to be set aside and appropriated. By his will the testator gave his residuary estate to his trustees upon trust to " sell dispose of "and convert into money all such parts thereof as shall not "consist of money or of some or one of the stocks funds or "securities in or upon which investments are hereinafter "authorised to be made and which they he or she shall think "proper to retain . . . ." The will then provides for the payment of debts and funeral and testamentary expenses, and then there follows the following investment clause: ". . . . shall lay out and invest the residue of the moneys "aforesaid or so much and such part thereof as shall not have "become absolutely vested in any of my sons under the trusts "hereinafter declared in the names or name of my said trustees "or trustee in or upon the Government bonds or other securities "of the United States of America or the bonds of the State of "Massachusetts or of the City of Boston or upon the bonds "of any of the following railway companies viz. the Boston "and Albany the Boston and Maine the Boston and Lowell "and the Boston and Fitchburg or upon mortgage of property "in the City of Boston or upon the bonds of such other "first-class railway companies as my said trustees or trustee "may select with power from time to time to vary such "investments and also the investment of any stocks funds "shares or securities which shall belong to me at my decease "and be retained unconverted for others of the same or the "like nature as they he or she shall think proper and "expedient." The testator then declared that his trustees should, at the expiration of twelve months from his decease, raise or appropriate and set apart the sum of 50,000*l.*, and settle that sum upon his eldest daughter. The testator then further declared that, at the expiration of twelve months from his decease, his trustees should: ". . . . raise or appropriate or set "apart from and out of the stocks funds shares and securities "to arise from the investment hereinbefore directed or which "shall belong to me at my decease and be retained unconverted "the further sum of 35,500*l.* sterling . . . . or stocks "funds shares or securities which on the day of the appropriation thereof shall be equal in amount or value to the sum of "35,500*l.* or of the stocks funds shares or securities so to be "appropriated as last aforesaid upon the trusts hereinafter "mentioned that is to say upon trust either to invest the said "sum of 35,500*l.* or to continue the same invested in or upon "some or one of the stocks funds or securities in or upon which "investments are hereinbefore authorised to be made with "power from time to time to vary such investments for others "of the same or the like nature as my said trustees or trustee "shall think proper or expedient . . . ."

The beneficial interests in respect of the sum of 35,500*l.* were then declared, being in favour of the testator's second daughter and her children. There followed a power to postpone the conversion and to retain the investments existing

SIMONDS J.
1939
WARREN, *In re.*
PUBLIC TRUSTEE *v.* FLETCHER.

at the date of the testator's death. By a deed dated August 26, 1938, the Public Trustee was appointed a trustee of the testator's will, so far as regarded the trust legacy of 35,500*l.* A schedule to that deed set out a list of the investments in which the fund was invested at that date. The list did not include any investments authorized by the testator's will, nor were the investments such as the testator could have held at the date of his death, since they were all stocks which had been created or first issued at a date subsequent to the testator's death.

The question raised was whether the Public Trustee had power to invest in any securities authorized by law for the investment of trust funds.

Hubert Rose for the plaintiff. The testator has specified certain securities only for the investment of moneys under his will, and directed the appropriation of such securities to the amount of 35,500*l.* for a legacy settled on his daughter and her children. The moneys are now all invested in the statutory range of investments. Some of the original securities mentioned in the will do not now exist. The question arises whether there is power to invest in other authorized securities, or if the trustees have not such power already, whether the Court will confer it on them under s. 57 of the Trustee Act, 1925.

Under the Trustee Act, 1893, s. 1, it was clear that a direction to invest funds in one particular way did not expressly "forbid" investment in any securities authorized by the Act: *In re Maire.* (1)

But the language of the Trustee Act, 1925, is now different. Under s. 69, sub-s. 2, the powers given to trustees by the Act are to be in addition to the powers, if any, given them by the instrument creating the trust "if and so far only as a "contrary intention is not expressed therein."

It is submitted that though the language of the Act has been altered, the meaning is the same and there is no alteration in the law. There are no negative words in the will, prohibiting any other investments than those mentioned, or expressing any intention to exclude statutory powers. The range of statutory investments must be read into the will if it is not there, and there is no reason why the trustees should not invest in any securities authorized by law. *In re Turner's Will Trusts* (1); *In re Burke* (2); *In re Owthwaite.* (3)

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(1) (1905) 49 Sol. Jo. 383.

Wilfrid Hunt for the first three defendants, and *T. Cunliffe* for the remaining defendant, adopted this argument.

SIMONDS J. The question now raised is whether the direction contained in the will for investment in or upon the bonds or other securities therein specified constitutes the expression of a contrary intention within the meaning of the Trustee Act, 1925, s. 69, sub-s. 2, so that the Public Trustee is not at liberty to exercise the powers of investment and varying investments given by the Trustee Act, 1925, s. 1. The question is, therefore, whether, under the will and the 1925 Act, the Public Trustee is confined to the power to invest contained in the will, or whether he has the further powers given by the 1925 Act. The question would be free from doubt if the matter fell to be decided under the Trustee Act, 1893, s. 1, which provided as follows: "A trustee may, unless "expressly forbidden by the instrument (if any) creating the "trust, invest any trust funds in his hands, whether at the time "in a state of investment or not, in manner following . . . ."

Under that section, there was a power to invest in the authorized investments unless there was an express prohibition. The mere provision in the will for investment in a list of specified investments, with no negative provision, did not amount to an express prohibition. For some reason, the Trustee Act, 1925, s. 1, departs in its language from the Trustee Act, 1893, s. 1, since the 1925 Act provides as follows:

"(1.) A trustee may invest any trust funds in his hands, "whether at the time in a state of investment or not, in "manner following . . . ."

The gap in the Trustee Act, 1925, s. 1, is made good by s. 69, sub-s. 2, of that Act, which provides as follows: "The

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(1) [1937] Ch. 15.

(2) [1908] 2 Ch. 248.

(3) [1891] 3 Ch. 494.

"powers conferred by this Act on trustees are in addition to the "powers conferred by the instrument, if any, creating the "trust, but those powers, unless otherwise stated, apply if and "so far only as a contrary intention is not expressed in the "instrument, if any, creating the trust, and have effect subject "to the terms of that instrument." Thus, the reference to an express prohibition has gone, and in its place the exception now is: "so far only as a contrary intention is not expressed in the will." The 1925 Act was intended to be a consolidating Act, and, though it contains some new provisions, it would be strange if there were any serious departure from the 1893 Act: *In re Turner's Will Trusts.* (1) The principle that a consolidating Act is not intended to alter the law is applicable here. It is inconceivable that the Legislature intended to depart, as to investment, from the position under the 1893 Act. I am therefore bound to give to the words "contrary intention" in the Trustee Act, 1925, s. 69, sub-s. 2, the same force as that given to the words "unless expressly forbidden" contained in the 1893 Act. Accordingly, I have here a direction that the trustee shall invest in certain specified investments, but no prohibition against other investments. It follows, in my judgment, that the Public Trustee has power to invest the fund in any of the investments authorized by the 1925 Act. A further point arises as to whether the direction in the will to appropriate certain investments to the fund alters the position, and *In re Owthwaite* (2) is cited on this point. I cannot assent to the doubt expressed by Kekewich J. in that case, as to whether, where investments have been appropriated to an annuity fund pursuant to a direction in a will, it is competent to the trustees to sell those investments and invest the proceeds in trustee investments. I feel doubt as to whether the decision itself was justified, but, however that doubt may be resolved, there is a distinction between the case of an annuity fund and that of a fund for a settled legacy. If the decision is binding, I regard it as binding only on the appropriation of a fund for an annuity, which is not the case here, I accordingly answer the question on construction of the

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(1) [1937] Ch. 15.

(2) [1891] 3 Ch. 494.

SIMONDS J.

1939

WARREN, *In re.*

PUBLIC TRUSTEE *v.* FLETCHER

will and the investment clause in it by saying that the direction in the will does not constitute the expression of a contrary intention. Accordingly, the Public Trustee is at liberty to exercise the powers of investment and varying investments conferred on trustees by the 1925 Act.

Solicitors: *Thompson, Quarrell & Co.*; *Sharpe, Pritchard & Co., for Laces & Co., Liverpool*; *J. & P. J. F. Chapman-Walker.*

H. L. L.

[1950] 1 Ch. 150

Considered. *Re* McGreavy. [1950] 1 All E.R. 30.

Approved. *Re* McGreavy. [1950] 1 All E.R. 442.

Approved. *In re* McGreavy [1950] 1 Ch. 269

CROSSMAN J.

1939

May 1.

In re THE NORTH BUCKS FURNITURE DEPOSITORIES, LIMITED.

Local Authority—Company—Unpaid rates—Petition by local authority to wind up company—Companies Act, 1929 (19 & 20 *Geo.* 5, *c.* 23), *ss.* 170, 264.

Though a registered company limited by shares cannot be sued in an action by a local authority for the recovery of unpaid rates, it can be wound up compulsorily by the Court on a petition presented by the local authority if, under a distress warrant, no goods are found on its premises which can properly be seized.

The local authority in such a case is a creditor within s. 170 of the Companies Act, 1929 and entitled to present a petition.

PETITION.

This was a petition by the Hampstead Borough Council, London, to wind up a registered company, the North Bucks Furniture Depositories, Ld., of Finchley Road, London, N.W., on account of the non-payment of a sum of 64*l.* 2*s.* 10*d.*, being rates found due by the company to the council for the period June 21, 1938, to March 31, 1939. The facts as alleged in the petition were as follows: "(*a*) The company is indebted to the petitioners in the sum "of 64*l.* 5*s.* 7*d.* for general rate and costs for the period from "June 21, 1938, to March 31, 1939, in respect of shop premises "known as 289, Finchley Road, and for which the company "is the rated occupier. (*b*) The said general rate has been "duly demanded as provided by law. (*c*) The company has "neglected or refused to pay the said general rate. (*d*) A "summons in proper form was issued calling upon the company "to show cause why they refused or neglected to pay the sum "of 64*l.* 2*s.* 10*d.*, being the amount due to the petitioners from "the company in respect of the general rate for the period from "June 21, 1938, to March 31, 1939, but the company failed to "show cause as aforesaid, and on February 2, 1939, a distress "warrant was issued by the magistrates sitting at the Hamp-"stead court of summary jurisdiction, and on February 14, "1939, your petitioners' bailiff attended at the premises "occupied by the company, but was unable to find any goods "and chattels of the company whereon to levy for the said sum "of 64*l.* 5*s.* 7*d.* as the goods and chattels at the said premises "belonged to other persons." Then there was an allegation that in the circumstances it was just and equitable that the company should be wound up, and the petitioners therefore petitioned as creditors for the winding-up of the company under s. 170 (1) of the Companies Act, 1929.

Gerald Upjohn for the petitioners. Though there is no reported decision on this point, a local authority is, it is submitted, a creditor, within s. 170 of the Companies Act, 1929 (1), for unpaid rates. As long ago as 1601, a remedy to levy rates for poor law relief was given by statute (43 Eliz. c. 2). A local authority cannot sue for unpaid rates: see *Liverpool Corporation* v. *Hope* (2); it is, however, a creditor for rates within s. 170 of the Act of 1929 (1), and also a preferential creditor under s. 264 of that Act. It is just and equitable that this company should be wound up by the Court.

The company did not appear.

CROSSMAN J. This is a petition by the mayor, aldermen and councillors of the borough of Hampstead, London, against the North Bucks Furniture Depositories, Ld., claiming the usual compulsory order to wind up the company. The petition is based upon the allegation that the petitioners are creditors for 64*l.* 5*s.* 7*d.* for rates and costs.

[His Lordship read the petition as set out above.]

It has been suggested that the rating authority, in this case the Hampstead Borough Council, is not a creditor within s. 170 of the Companies Act, 1929, and is therefore not entitled to present a petition. Sect. 170, sub-s. 1, of the Companies Act, 1929, is as follows: "An

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(1) Companies Act, 1929, s. 170, sub-s. 1: "An application to the "court for the winding-up of a "company shall be by petition, "presented subject to the provi-"sions of this section either by the "company, or by any creditor or "creditors (including any contin-"gent or prospective creditor or "creditors), contributory or con-"tributories, or by all or any of "those parties, together or separ-"ately."

(2) [1938] 1 K. B. 751.

"application to the court for the winding up of a company "shall be by petition, presented subject to the provisions of this "section either by the company, or by any creditor or "creditors (including any contingent or prospective creditor "or creditors), contributory or contributories, or by all or any "of those parties, together or separately."

The only question which arises here, because apart from this, I feel no doubt that it is a case in which the winding-up order ought to be made, is this: Are the petitioners creditors within the meaning of that section? The right to recover rates arose originally under the Poor Relief Act, 1601 (43 Eliz. c. 2), which provided that the overseers of the poor—and this borough council is now the rating authority in the position of the overseers—were to settle the rate and to demand it, and gave them power to apply to the justices to issue a distress warrant in case the rate was not paid. What was decided by the Court of Appeal in the case to which I have been referred, *Liverpool Corporation* v. *Hope* (1), was that an action by a local authority to recover unpaid arrears of rates will not lie; the proper method of procedure in such a case is by application for a distress warrant, followed by distress; and, the county court judge having held that an action would lie in respect of unpaid arrears of rates, the Court of Appeal, reversing his decision, held that, " a rate, not being a common "law liability but the creature of statute," this method of procedure was wrong, and the only remedy available was that laid down by statute, namely distress.

It is quite clear that that decision would involve this, that the local authority could not have sued this company in an action for the rates; but it does not in my judgment affect the question which I have to determine; all it determines is that the local authority cannot sue. What I have to consider is whether on the construction of this particular Act the Hampstead Borough Council is a creditor. Mr. Upjohn has called my attention to the section of the Act which seems to me to be conclusive in favour of the view that a local authority—which has a right to recover rates from a company by distress—is a creditor of that company within the meaning of the Act. It is, I think, shown by s. 264, which is the one which gives rates preference in the winding up of a company. Sub-s. 1 of s. 264 is as follows: "In a winding-up "there shall be paid in priority to all other debts—(*a*) All "parochial or other local rates due from the company at "the relevant date, and having become due and payable "within twelve months next before that date, ..." Then sub-s. 4 refers to "the foregoing debts," which must include "parochial or other local rates," and provides that they shall: "(*b*) In the case of a company registered in "England, so far as the assets of the company available for "payment of general creditors are insufficient to meet them, "have priority over the claims of holders of debentures under "any floating charge . . . . ," referring apparently to the persons who would be entitled to recover rates, among other things, as contrasted with general creditors, which suggests that the Act is treating the persons entitled to recover rates as creditors. Then again sub-s. 5 provides that: "Subject to "the retention of such sums as may be necessary for the costs "and expenses of the winding-up, the foregoing debts shall ". . . . ," again describing "parochial or other local rates" as "debts." Again in sub-s. 6 they are referred to as "the debts to which priority is given by this section."

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(1) [1938] 1 K. B. 751.

It seems to me that in view of s. 264, it is impossible to suggest that the body which is entitled to recover these rates for which preference is given by the section is not a creditor of the company within the meaning of s. 170. (1)

In my judgment the Hampstead Borough Council is entitled to present the petition in this case, and I make the usual order for compulsory winding-up of the company.

Solicitor: *P. H. Harrold, Town Clerk, Hampstead.*

(1) See note (1) ante, p. 691.

A. R. Ll.-T.

C. A.

1939

Jan. 13.

In re MUSCOVITCH.

Ex parte MUSCOVITCH.

Bankruptcy — Appeal — Notice to registrar — Time — " Forthwith " — Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 109, *sub-s.* 4 ; *s.* 147, *sub-s.* 1—*Bankruptcy Rules,* 1915, *rr.* 132, 385, 386.

Rule 132 of the Bankruptcy Rules, 1915, provides that: "Upon entering an appeal, a copy of the notice of appeal shall "forthwith be sent by the appellant to the Registrar of the "Court appealed from, who shall mark thereon the date when "received and forthwith file the same with the proceedings."

On October 21, 1938, an order was made by the county court of Cardiff and Barry, under which the appellants' discharge from bankruptcy was suspended for six months. The appellants entered an appeal on October 25. The appellants sent a copy of the notice of appeal in time to be effected on October 28 in Cardiff :—

Held (affirming the decision of the Divisional Court), that the copy of the notice of appeal had not been sent " forthwith " within the meaning of r. 132.

Appeal from Divisional Court in Bankruptcy.

The county court of Cardiff and Barry made an order, dated October 21, 1938, by which the appellants' discharge from bankruptcy was suspended for six months. An appeal was entered and the deposit lodged on October 25. A notice of the appeal was served on the respondent, the Official Receiver, on October 28, and a copy of the notice was sent in time to be served on the registrar of the county court at Cardiff on the same day. The point was taken that a copy of the notice had not been sent " forthwith " to the registrar of the county court at Cardiff in compliance with r. 132 of the Bankruptcy Rules, 1915.

The Divisional Court in Bankruptcy upheld the objection.

The appellants appealed. The appeal was heard on January 13, 1939.

G. F. Kingham for the appellants. Rules 129 to 135 of the Bankruptcy Rules, 1915, are the effective rules in respect of appeals. Under r. 130 twenty-one days is allowed for appealing. It is under r. 132 that the time is limited for serving

C. A.
1939
MUSCOVITCH, *In re.*
MUSCOVITCH, *Ex parte.*

the notice of appeal on the registrar of the county court, but under s. 109, sub-s. 4, of the Bankruptcy Act, 1914, the Court may extend the time upon such terms as it may think fit. In *In re Vitoria* (1) no copy of the notice of appeal was sent to the registrar of the county court. Rule 385 deals with non-compliance with the rules, and under r. 386 the Court may, under special circumstances, extend the time. *Ex parte Lamb* (2) and *Ex parte Lyon* (3) were under r. 144 of Bankruptcy Rules, 1870, which was similar to the present r. 132, and in each case the appellants were clearly out of time. In *In re Sillence* (4) it was held that "forthwith" in r. 144 meant within twenty-one days from the date of the order appealed from. In *Ex parte Williams* (5) the copy of the notice of appeal was not served on the county court registrar within the proper time, owing to the county court office being closed for five days at Christmas, and it was held that, under the circumstances, the appellant had not been guilty of unreasonable delay and had complied with r. 144.

"Forthwith" does not mean immediately, but within a reasonable time. It is a question of degree. Here the copy of the notice had been served on the registrar within a reasonable time. The appeal ought to be allowed.

Sir Terence O'Connor S.-G. and *V. R. Aronson* for the respondent. Court of Appeal in the bankruptcy rules means any court to which the matter is brought. Rule 132 means that, when one thing is done, the other thing must be done immediately: *Ex parte Lamb.* (2) There is a mandatory obligation on the Court not to hear such an appeal: therefore the Divisional Court could not do otherwise than it has done.

[SIR WILFRID GREENE M.R. What about the power of the Court under s. 109, sub-s. 4, and s. 147, sub-s. 1?]

The answer is in *In re Vitoria.* (1) Sect. 147 has nothing to do with this type of case. The omission to serve in time was fundamental, not a mere irregularity. Rule 388 must

(1) [1894] 1 Q. B. 259.
(2) (1881) 19 Ch. D. 169.
(3) (1882) 45 L. T. 768.
(4) (1877) 7 Ch. D. 238.
(5) (1882) 46 L. T. 237, 242.

be read with s. 109, sub-s. 4, and it cuts down the section considerably. This appeal should be dismissed.

Kingham replied.

SIR WILFRID GREENE M.R. I share the regret expressed by the Divisional Court in finding myself unable to allow the appeal so far as this preliminary point is concerned, because it seems to me that the language of the relevant bankruptcy rule as construed by this Court is too strong to enable me to say that the appellants are entitled to succeed on this point. I cannot help thinking that the language of the relevant rule is nowadays somewhat anachronistic, because it was introduced at a time when procedure was in many important respects different from what it is now. If and when the bankruptcy rules come up for reconsideration, this rule is one which might well be considered. But, as the law stands at present, it seems to me that we are precluded by authority from acceding to the argument put before us by Mr. Kingham.

The short point is this. The appellants appealed from an order under which their discharge from bankruptcy was suspended for six months. The order was completed on October 21, 1938, and accordingly there were twenty-one days from that date for the entering of the appeal and the serving of the notice of appeal. That twenty-one days would have expired on November 11; the appeal was in fact entered and the deposit lodged on October 25, 1938. On entering the appeal the appellants came under the duty which is imposed by r. 132 of the Bankruptcy Rules. That rule is as follows: " Upon entering an appeal, a copy of the "notice of appeal shall forthwith be sent by the appellant to "the Registrar of the Court appealed from, who shall mark "thereon the date when received and forthwith file the same "with the proceedings." The object of that rule is to enable an appeal to be entered in the country, not entered in the formal sense, but recorded in the country, for the information of all concerned. The question in the present case is whether the sending of the notice under that rule which was in fact made, was effected "forthwith." It was effected on October 28 in Cardiff and on the same day as the notice of appeal was served on the respondent, the Official Receiver. What prejudice can be suffered by anybody as the result of the three days, or the two complete days, being allowed to expire between the entering of the appeal and the serving of the notice I cannot myself imagine. Nevertheless, the rule peremptorily says that the notice must be "sent forthwith." The first question therefore which arises is whether the serving of that notice on October 28, when the appeal was entered on the 25th, was a "sending forthwith" of the notice. This Court as long ago as the year 1881 had to consider the meaning of the word "forthwith" in the then existing bankruptcy rule which in this respect is the same as the present rule. That was the case of *Ex parte Lamb* (1), where Sir George Jessel M.R. pointed out the object of the rule, which was to enable the other side to ascertain whether there is to be an appeal or not; and he found that on the facts of that case the sending of the notice had not been forthwith. On the facts of that case, the appeal was entered on the last day available for the purpose, and the copy of the notice of appeal was sent by post to the agents for the solicitors, who sent a copy to the registrar of the county court. There were in point of fact three hours available in London to get the requisite notice into the post in time. It was held that the fact that those three hours were available and were not taken advantage of prevented the sending of the notice being a sending forthwith. Lush L.J. construed the rule in this way. He said (2): "The entry "of the appeal in London and the giving notice to the "Registrar in the country were one continuous act, which was "to be done within a reasonable time." When one looks at the circumstances of the present case, there was no reason at all why the notice should not have been sent at once as soon as the appeal was entered. Having regard to the construction which was put upon the word "forthwith," which is peremptory and admits of no interval of time between the entry of the appeal and the sending of the notice, save such as may be imposed by circumstances which cannot be avoided, I find it impossible in the present case to say that the notice was sent forthwith within the meaning of the rule.

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(1) (1881) 19 Ch. D. 169, 173. (2) Ibid. 174.

Then the question arises as to whether the Court has any power, on the facts of this case, either to waive the irregularity or formally to extend the time for service of the notice. It was suggested that, under the general power which the Court has under s. 147, sub-s. 1, of the Act to dispense with irregularities, the delay might be overlooked; but we are precluded, in my opinion, from so holding by the decision of this Court in the case of *In re Vitoria.* (1) That was a case where the Divisional Court had entertained an appeal notwithstanding the fact that no notice had been sent to the registrar of the county court; in other words, they waived compliance with the rule, treating non-compliance as a mere irregularity. When the matter came before the Court of Appeal, two suggestions were made for getting over the difficulty. One was that it was an irregularity, as the Divisional Court had held, and the other was that the time might be extended. This Court, I think, quite clearly negatived the view that failure to comply with that rule was a mere irregularity. It is perfectly true that in that case there had been no notice sent at all, but the language used by this Court precludes me from saying that a service not effected forthwith would still be a mere irregularity. This Court held that the rule means what it says and has to be complied with. Therefore, in my judgment, that authority compels us to say that the failure to send the notice forthwith is not a mere irregularity which can be cured under that section, nor do I think that it is an irregularity which can be cured under r. 385 of the Bankruptcy Rules, the scope of which, I think, is confined, as in the corresponding rule of the Supreme Court it is confined, to irregularities.

The only remaining question is whether or not this Court can retrospectively extend the time. With regard to that, the relevant section of the Act is s. 109, sub-s. 4, which gives power to extend time on terms without any express reference to special circumstances. But the rule which provides for extending time, which is r. 386, provides that "The Court "may, under special circumstances and for good cause shown, "extend or abridge the time appointed by these Rules or "fixed by any order of the Court for doing any act or taking "any proceeding." As appears from *In re Vitoria* (1) (and I think it is regarded as settled) notwithstanding the absence of words in the section referring to special circumstances, reading the section and the rule together—and the rule is to be treated as part of the Act; that appears from s. 132 of the Act itself—special circumstances have always been required to be shown before an application for extension of time can be granted. In the case of *In re Vitoria* (1) it was held that special circumstances were required to extend the time, and that no special circumstances existed in that case. In the present case there is no suggestion of special circumstances at all. There was no reason whatever why the notice should not have been sent, and no explanation is given which can in any way amount to what the Court is accustomed to treat as special circumstances, sufficient to enable the time to be extended.

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(1) [1894] 1 Q. B. 259.

On those grounds, therefore, although, as I have already said, with regret, finding myself bound by what, on the facts of this case, is a pure technicality hurting nobody, I am constrained to decide that the appeal fails and must be dismissed with costs.

FINLAY L.J. I agree.

LUXMOORE L.J. I also agree.

Appeal dismissed.

Solicitors for appellants: *Hancock and Willis, for David Morris, Newport.*

Solicitor for respondent: *The Solicitor, Board of Trade.*

P. J. B.

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(1) [1894] 1 Q. B. 259.

SIMONDS
J.

1939
April 19.

In re FRAME.

EDWARDS *v.* TAYLOR.

[1938. F. 1092.]

Will—Construction—Legacy upon conditions—Condition of adoption of child—Petition for adoption dismissed—Failure of condition—Trust created for maintenance of child—Adoption of Children Act, 1926 (16 & 17 *Geo.* 5, *c.* 29).

A testator by his will specifically bequeathed moneys to a legatee upon condition that she adopted his youngest daughter and made certain payments to other children. The legatee presented a petition to the county court for an order under the Adoption of Children Act, 1926, but owing to opposition it was dismissed. On a summons taken out to determine whether, the condition not having been performed, the gift failed :—

Held, that, though expressed as a condition, the gift created an enforceable trust for the maintenance of the testator's daughter while she was an infant, and that the legatee was bound to provide maintenance for her, whether she obtained an adoption order or not.

SUMMONS.

The testator, Alfred Edward Frame (otherwise Edwards) by his will dated February 25, 1935, appointed the defendant, Mrs. Ada Taylor, his housekeeper, to be his executrix, and gave and bequeathed to her, as "his dearest friend," all money and insurance policies, which he had held for years, "on condition "that she adopt my daughter Alma Edwards and also gives to "my daughters Jessie Edwards and May Alice Edwards the "sum of 5*l*. each, and a like sum of 5*l*. to my son Alexander "Edwards."

The testator died on October 18, 1937, and his will was duly proved by the said defendant on November 26, 1937.

The testator, who was a licensed victualler, at the time of his death was the tenant of the Blue Anchor, High Street, Bromley-by-Bow, and his estate consisted of two small insurance policies, 519*l*. on current account at Barclay's Bank, household goods and furniture, and 200*l*. deposited with his brewers, Watney, Coombe, Reid & Co., as security for payment of his account with them. He was married to one Minnie Trenter in 1889, and by her he had one child, the plaintiff. His wife died in March, 1937, being then known as Mrs. Finch. The parties were separated within a comparatively short time after the marriage and the testator formed an association with one Alice Edith Gubbins. In 1909 he went through a form of marriage with her, and she lived with him until her death in 1924. By Alice Gubbins the testator had twelve children, of whom the youngest was his daughter Alma Edwards, named in the will, born on September 15, 1922.

The defendant Ada Taylor after the death of the testator informed Alma Edwards that she was willing to provide her with a home and maintain her until she reached the age of 21. She replied that she did not wish to live in a public house, and the defendant Taylor accordingly arranged that she should live with a married sister, Gladys Watts, the wife of Frank Watts.

In March, 1938, the defendant Taylor presented a petition to the Bow County Court under the Adoption of Children Act, 1926, in which she said she was anxious to adopt the girl, therein described as Alma Evelyn Edwards, then of New Cross, and asked that an order might be made for her adoption. The application was opposed by the infant and by some of her brothers and sisters. The County Court judge, having interviewed the infant, dismissed the petition. The defendant had not maintained the infant since she had left the testator's home, but had sometimes sent her the sum of 5*s*. a week.

This summons was taken out by the plaintiff as the only next-of-kin of the testator against the defendants Ada Taylor and Alma Evelyn Edwards, asking whether upon the true construction of the testator's will and in the events which had happened (1.) the bequest to the defendant Taylor of all money and insurance policies on condition that she should adopt the defendant Alma Evelyn Edwards and should give the sums of money mentioned in his will had failed or determined in consequence of non-compliance with the condition as to adoption; (2.); if the bequest had not failed or determined, whether the property comprised therein was subject to any and what trusts for the benefit of the defendant Alma Evelyn Edwards, and, if so, for what period; (3.) an enquiry as to the testator's next-of-kin and that the plaintiff might be appointed to represent them.

R. W. Goff for the plaintiff. The condition as to adoption is a condition precedent, and not having been performed the gift fails. There has been no adoption under the Adoption Act, and in any event the infant refuses to live with the defendant Ada Taylor or to be adopted by her. See *Roundel* v. *Currer* (1), *Robinson* v. *Wheelwright.* (2)

Milner Holland for the defendant Ada Taylor. This defendant has since the testator's death always regarded herself as under an obligation to maintain the infant defendant. The condition is not a condition precedent, but a condition subsequent, and, if it has been made impossible of performance, the failure is not due to any act of this defendant. The gift is good, although the condition is one which cannot be performed, owing to the refusal of the infant to let herself be adopted.

G. P. Slade K.C. and *Peter Miller* for the defendant Alma Evelyn Edwards. This is not a mere condition, though it may be expressed as such, but an enforceable trust for the benefit of the infant.

There are (1.) conditions personal to the donee only, and (2.) conditions obliging the donee to do something for the benefit of another person. The Court can and has often treated a condition of the latter class as creating a trust for the benefit of the third person, and that is the class under which the condition in this will falls. *In re Kirk.* (3) *Broad* v. *Bevan.* (4)

Both this and the other condition as to the payment of 5*l.* each to three of the testator's children form a group of conditions not personal to the donee, but creating effective trusts. Whether or not there is a moral obligation on the defendant Taylor to adopt and maintain the infant, that cannot diminish in any way the latter's right to maintenance until she attains the age of 21. See Jarman on Wills, p. 1435.

R. W. Goff in reply. The word "adopt" does not go to the

(1) (1786) 2 Bro. C. C. 67.
(2) (1856) 6 De G. M. & G. 535.
(3) (1882) 21 Ch. D. 431.
(4) (1823) 1 Russ. 511.*n.*

expenditure of money, but refers to the performance of a particular act. The condition in its entirety is not enforceable. It cannot be partly enforced as a trust, and the rest of the obligation neglected as being impossible.

SIMONDS J. This case raises rather an interesting point. The testator, Albert Edward Frame, died on October 18, 1937, having made his will on February 25, 1935. The testator was at the time of his death the licensee of a public house in Victoria Dock Road, Canning Town. By his will he revoked all wills made by him. He appointed Mrs. Ada Taylor, the first defendant in these proceedings, to be the executrix, and directed that "all debts and testamentary expenses be paid so soon as "may be convenient after my death." Then he used these words: "I give and bequeath unto the said Mrs. Ada Taylor "all my money and insurance policies . . . on condition that she "adopts my daughter Alma Edwards and also gives to my "daughters Jessie Edwards and May Alice Edwards the sum of "5*l*. each and a like sum of 5*l*. to my son Alexander Edwards." The question is what those words mean. I have listened to an able and interesting argument on these questions: Whether the condition is a condition subsequent or a condition precedent; whether, if it be a condition precedent, the condition has become impossible of performance, and whether, if so, the gift fails; whether, if it be a condition subsequent, the donee has failed, through no fault of her own, to comply with the condition, and whether, in that event, the gift has failed. As I listened to that argument it impressed itself more and more on me that, after all, this was not a condition at all, for, in my view, on the true construction of this clause, the word "condition" is not used in its strict legal sense. It is a gift to Mrs. Taylor on condition, in the sense of on the terms or on the trust that she does certain things, and that, I think, becomes clearer when it is realized that the condition relates not only to the adoption of one daughter, but to the payment of certain sums to other daughters. A devise, or bequest, on condition that the devisee or legatee makes certain payments does not import a condition in the strict sense of the word, but a trust, so that,

SIMONDS J.

1939

FRAME, In re.

EDWARDS v. TAYLOR

though the devisee or legatee dies before the testator and the gift does not take effect, yet the payments must be made; for it is a trust, and no trust fails for want of trustees. When I come to look at the condition, it seems clear that what the testator intended was that Mrs. Taylor should receive certain moneys on the term that she performed certain acts. Much argument has been directed to what is involved in the condition that "she adopts my daughter." It seems clear that whether or not an adoption under the authority of an order made under the Adoption of Children Act, 1926, is necessary, what is intended is not any single formal act, but a series of acts to establish as between Mrs. Taylor and the testator's daughter the relationship of parent and child—in a word, Mrs. Taylor was to treat the child as if she were her daughter, because that is what adoption means. Is that a trust which the Court can enforce? It includes not only the parental duties of care, advice, and affection, but also the duty of maintenance. This Court cannot compel, so far as adoption involves the giving of care, advice and affection, that such things be given. But, seeing that it involves the duty of maintenance, that is a trust which the Court can enforce, directing, if necessary, an inquiry in that regard. It will not allow the whole trust to fail because in part it cannot be enforced.

Therefore, I come to the conclusion that the gift to Mrs. Taylor of all the money and insurance policies—what that means will have to be considered—on condition "that she adopts my daughter" involves that she receives those things, whatever they may be, on trust to make proper provision for the maintenance of the child as her adopted daughter. That is a trust which can be enforced, and, if necessary, an inquiry can be directed in regard to it.

Solicitors: *H. N. Robbins; Francis E. Ellis; J. C. L. S. Sharman.*

H. L. L.

In re WILLS.

DULVERTON *v.* MACLEOD.

SIMONDS J.

1939
April 25, 26;
May 10.

[1939. W. 468.]

Will—Construction—Shares of residue—Advancement of children by testator—Settlement of advances—Hotchpot clause—Rule for ascertaining capital and income to be brought into hotchpot—General rule of administration.

A testator by his will gave his residuary real and personal estate to his trustees upon trust as to two equal fifth shares to pay the income thereof to his widow during her life, and after her death to hold the same upon the same trusts as those declared concerning the capital and income of the remaining three-fifths, which were for division among his children who should attain the age of twenty-five years or marry and if more than one in equal shares, except that each of his sons was to take three times as much as each of his daughters, and the daughters' shares were settled upon them and their issue. The will contained a hotchpot clause in a common form by which the testator declared that all sums of money and investments and property which he had given or covenanted to give for the benefit of any child or his or her wife or husband or issue over 500*l.* at any one time, should be taken in and towards satisfaction of the share of such child in his residuary estate and should be brought into hotchpot and accounted for accordingly.

The testator, who left a very large estate, died in 1927, leaving his widow and five children, all then infants, surviving him. His eldest child attained the age of twenty-five in 1938, and shortly afterwards married. The estate consisted mainly of securities the value of which was quoted on the principal Stock Exchanges.

The testator during his life had settled property and investments of considerable but varying amounts upon each of his five children.

The trustees took out this summons to determine (inter alia) how the income and accumulations of income ought to be apportioned among the children, having regard to the hotchpot clause:—

Held, that interest at the rate of 4 per cent. per annum less tax on the capital sums to be brought into hotchpot ought to be added to the actual income of three-fifths of the estate as from the death of the testator, and the aggregate amount of income so arrived at divided into shares (each son's share being three times each daughter's) and credited to the respective children subject in each case to the deduction of interest on the capital sums to be brought into hotchpot, in accordance with the general rule of administration of the Court.

In re Rees (1881) 17 Ch. D. 701 and *In re Poyser* [1908] 2 Ch. 128 followed and applied.

In re Hargreaves (1903) 88 L. T. 100 distinguished.

In re Mansel [1930] 1 Ch. 352 not followed.

SUMMONS.

The testator, Frederick Noel Hamilton Wills, made his will on June 2, 1918, and thereby having appointed executors and trustees thereof, and having made certain specific devises and specific and pecuniary bequests devised and bequeathed all his residuary property to his trustees upon trusts for sale, conversion and investment, and subject as therein directed upon trust as to two equal fifth parts thereof to pay the income to his wife the defendant, Margaret Hamilton Wills, during her life, and after her death to hold the capital and future income of the said two fifth parts upon the trusts thereinafter declared concerning the remaining three fifth parts, that was to say upon trust for all or any his children who should attain the age of twenty-five years or marry, in equal shares except that each son should take three times as much as each daughter. The testator declared that the shares given to his daughters should not vest absolutely in them, and they were settled upon them respectively for their lives and after their deaths upon trust for their children as they should appoint, and in default equally.

The will contained the following hotchpot clause: "(19.) I "declare that all sums of money, investments, or property "which prior to my death I may have given or settled or "covenanted to give or settle to or for the benefit of any child "of mine or his or her wife or husband or issue either on his or "her marriage or otherwise over and above the sum of 500*l.* "at any one time shall in default of any direction to the contrary "under my hand be taken in or towards satisfaction of the "share of the said child in my residuary estate and shall be "brought into hotchpot and accounted for accordingly."

The will also contained full powers to the trustees to appropriate any part of the estate in satisfaction of any trust legacy or share, and for that purpose to make a valuation of the trust premises or any part thereof in such manner as they should think fit.

The testator died on October 11, 1927, and his will was duly proved on March 13, 1928, by two of the executors named therein. The testator left his widow, Margaret Hamilton Wills, and five children surviving him, namely, the defendant Rosemary, born in 1913, the defendant Michael, born in 1915, the defendant Hugh, born in 1917, the defendant Margery, born in 1923, and the defendant Audrey, born in 1925.

The testator left a very large estate which had increased in value since his death. In 1919, 1920 and 1922, he made settlements of certain investments upon his daughter Rosemary and her future issue, also for the benefit of his sons Michael and Hugh, and in 1923 and 1925 he made settlements on his younger daughters Margery and Audrey, and in 1925 a further settlement on all his children. The testator's eldest child, Rosemary, attained twenty-five on March 13, 1938, and in December, 1938, was married to John Macleod.

The present managing trustees of the will, Baron Dulverton and Hugh Alastair Hamilton Fraser, took out this summons to have determined certain questions of construction and administration arising on the will, and in particular, (4.) that it might be determined whether for the purpose of the division of the income and accumulations of income of the three-fifths of the testator's residuary estate in which his widow took no life interest pending the appropriation thereof (*a*) interest at the rate of 4 per cent. per annum less tax on the capital sums to be brought into hotchpot by each child (or in the alternative the actual income received from such capital sum) ought to be added for computation to the actual income of three-fifths of the estate for the period and the aggregate amount of income so arrived at ought to be divided into equal shares (except that the share of each son should be three times as much as the share of each daughter) and credited to the respective children, subject in each case to the deduction of interest at the rate aforesaid on the sum to be brought into hotchpot, or (*b*) the sums to be brought into hotchpot ought to be added for computation to three-fifths of the capital of the residuary estate and the sum to be brought into hotchpot by each child deducted from such child's share (each son's share being three times as great as each daughter's share) in the aggregate amount of capital so arrived at, and the income and accumulations of income of the residuary estate allocated to the children in proportion to their respective shares of capital so arrived at,

The first method described under (*a*) was that adopted in *In re Poyser* (1) and other cases; the method described under (*b*) was adopted in *In re Hargreaves.* (2)

There were very large accumulations of income to be allocated.

H. B. Vaisey K.C. and *C. V. Rawlence* for the plaintiffs.

G. P. Slade K.C. and *L. M. Jopling* for the defendants, Mrs. Macleod and Margery and Audrey Wills (infants).

The general rule followed in *In re Poyser* (1) and other cases should be applied and interest at the rate of 4 per cent., or alternatively the interest actually earned, charged on the advances as from the testator's death.

In *In re Mansel* (3), Farwell J. reviewed all the authorities and followed the decision of the Court of Appeal in *In re Hargreaves* (2), in preference to the rule in *In re Poyser.* (1) The present case is distinguishable from *In re Mansel* (3) because here the gift is to a class and the testator did not intend immediate distribution. Further, here the Court is dealing not with ordinary advances, but with settled sums, and it would be possible to ascertain actual income, for the purpose of bringing into hotchpot income against income.

The decision in *In re Mansel* (3) cannot be reconciled with that in *In re Tod.* (4) The general rule of the Court is as laid down in *In re Tod.* (4) See also *In re Rees.* (5)

In *In re Hargreaves* (2) the remarks of Romer L.J. were not intended to lay down any general principle, but should be construed as applicable only to the will he was then dealing with. All that he meant was that in that will it was unnecessary to make any artificial calculation of interest, because the testator had said exactly what was to be done.

(1) [1908] 1 Ch. 828.
(2) (1903) 88 L. T. 100.
(3) [1930] 1 Ch. 352.
(4) [1916] 1 Ch. 567.
(5) (1883) 17 Ch. D. 701.

The funds subject to the will must be valued as on the date of distribution for the purposes of capital hotchpot. See Jarman on Wills, 7th ed., at p. 1146.

C. Montgomery White for the defendants, Hugh and Michael Wills. The rule in *In re Hargreaves* (1) should be applied. The judgment of Romer L.J. lays down a general principle applicable to similar cases, and it was applied by Farwell J. in *In re Mansel.* (2)

Warrington J. in *In re Poyser* (3) distinguished *In re Hargreaves* (1) on the ground that the testator did not contemplate an immediate division in the former case. The decision in *In re Hargreaves* (1) has been followed by Eve J. in *In re Hart* (4) and by Neville J. in *In re Gilbert.* (5)

The rule in *In re Hargreaves* (1) would not have been applied in *In re Poyser* (3), as the testator excluded it by directing interest at the rate of 4 per cent. on advances to be brought into hotchpot. Here there is no direction as to interest. The testator intended the value of his estate together with the previous advances settled on his children to be ascertained at his death. Where it is possible so to value the estate, the rule in *In re Hargreaves* (1) should be applied. The cases in which *In re Poyser* (3) has been followed are cases where it has been impracticable to value the estate as at the death, and it has therefore been necessary to calculate interest from that date.

In *In re Craven* (6) the trustees had adopted the rule of *In re Poyser* (3) without challenge for a period of 20 years. In *In re Forster-Brown* (7) Sargant J. held that the period of distribution was the death of the testator's widow, and that the testator did not contemplate any valuation of the children's shares at his own death.

In re Poyser (3) was, on the facts, an entirely different case from the present, and by itself is no authority against the application of the rule of *In re Hargreaves.* (1) In *In re Cooke* (8) a valuation at the date of the testator's death was impossible,

(1) 88 L. T. 100.
(2) [1930] 1 Ch. 352.
(3) (1908) 1 Ch. 828.
(4) (1912) 107 L. T. 757.
(5) [1908] W. N. 63.
(6) [1914] 1 Ch. 358.
(7) [1914] 2 Ch. 584.
(8) [1916] 1 Ch. 480.

and so the method of *In re Hargreaves* (1) could not be applied.

The device of charging interest on advances should not be resorted to, unless it is absolutely necessary to do so, per Romer L.J. (2)

All the authorities were recently reviewed by Farwell J. in *In re Mansel* (3) and that decision is applicable to the present case and should be followed.

A. Andrewes-Uthwatt for Mrs. Margaret Wills.

L. M. Jopling replied.

Cur. adv. vult.

1939. May 10. SIMONDS J. The testator, Frederick Noel Hamilton Wills, made his will on June 2, 1918, and thereby so far as it is material to state it for the purpose of the present case, directed his trustees to stand possessed of his residuary estate on trust as to two equal fifth parts thereof to pay the income thereof to his wife during her life and after her death to hold the capital and future income thereof on the trusts thereafter declared concerning the remaining three-fifths parts thereof; that is to say, on trust for all his children who being male should attain the age of twenty-five years, or being female should attain that age or marry under it, and if more than one in equal shares, except that each son should take three times as much as each daughter. The testator then directed that his daughters' shares should not vest in them absolutely, but should be held on the usual trusts for the benefit of them and their children, which I need not state in greater detail, and after certain provisions as to maintenance and accumulation declared by clause 19 as follows: "I declare "that all sums of money investments or property which prior "to my death I may have given or settled or covenanted to "give or settle to or for the benefit of any child of mine or "his or her wife or husband or issue either on his or her marriage "or otherwise over and above the sum of 500*l.* at any one time "shall in default of any direction to the contrary in writing

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(1) 88 L. T. 100.
(2) Ibid. 101.
(3) [1930] 1 Ch. 352.

"under my hand be taken in or towards satisfaction of the "share of the said child in my residuary estate and shall be "brought into hotchpot and accounted for accordingly."

The testator died on October 11, 1927, leaving his widow him surviving and five children, whom I will call shortly Rosemary, Michael, Hugh, Margery and Audrey. Rosemary was born on March 15, 1913, Michael on October 4, 1915, and Hugh on June 19, 1917. Margery and Audrey are still infants and unmarried. Therefore Rosemary alone has acquired an indefeasible interest in the residuary estate.

The testator had before his death made settlements of varying amounts on each of his children. He died possessed of a very large fortune, and the presumptive share of each of his children in the three-fifths of his residuary estate in which his widow had no life interest largely exceeds the settled sums which have to be brought into account against that share under the provisions of clause 19. His estate not specifically devised and bequeathed consisted, except to a trivial extent, of securities quoted on the principal Stock Exchanges. In these circumstances the trustees seek the directions of the Court on the following question : "That it may be determined "whether for the purpose of the division of the income and "accumulations of income of the three-fifths of the testator's "residuary estate in which his widow the defendant Margaret "Hamilton Wills takes no life interest pending the appropriation "thereof : (*a*) interest at the rate of 4 per cent. per annum "less tax on the capital sums to be brought into hotchpot "against each child or in the alternative the actual income "received from such capital sum ought to be added for compu-"tation to the actual income of three-fifths of the estate for "the period and the aggregate amount of income so arrived "at ought to be divided into equal shares (except that the "share of each son shall be three times as much as the share "of each daughter) and credited to the respective children "subject in each case to the deduction of interest at the rate "aforesaid on the sum to be brought into hotchpot or (*b*) the "sums to be brought into hotchpot ought to be added for "computation to three-fifths of the capital of the residuary "estate and the sum to be brought into hotchpot by each child "deducted from such child's share (each son's share being "three times as great as each daughter's share) in the aggregate "amount of the capital so arrived at and the income and "accumulations of income of the residuary estate allocated to "the children in proportion to their respective shares of capital "so arrived at."

The second alternative under (*a*) is a method which has never been adopted by the Court in such a case, and I do not propose to introduce it for the first time. The choice lies between the first alternative under (*a*) and (*b*), and it is not an easy one in the present state of authority.

At the outset of my judgment I wish to emphasize the nature of the matter with which I am dealing. It is a rule of administration resting not on the particular directions of a testator, but on the general principle, that this Court in administering the estate of a deceased man endeavours to deal fairly between his beneficiaries. That principle requires that, where an advanced beneficiary has to bring the capital amount of his advance into hotchpot against his share of the capital of the estate, some means must be devised of equalizing the position with regard also to the income of the estate, for it would be manifestly unfair that the advanced beneficiary should at once enjoy the interest of the sum advanced and be placed in the same position as unadvanced beneficiaries with regard to the income earned by the capital of the estate before distribution.

The Court might have adopted one of many methods of meeting this difficulty. Three methods are indicated in the question of the summons which I have read. Any one method might in a particular case appear to be the fairest, and in another case another. But in this, as in other matters of administration, it has long been realized that the essential thing is to have a settled rule. It may work less well in some cases than in others, but that is probably true of every rule of equity or of law and is a consideration of little weight against the importance of certainty and regularity. Nor is it less important when once a rule has been established not to refine on it by exceptions and exceptions on exceptions, for thus there is created just the state of uncertainty and confusion which led in the first place to the establishment of the rule.

With these commonplace considerations in mind I turn to the problem raised by this summons. It is one for the solution of which a settled rule was established very long ago. I do not think it necessary to look back more than a little over 100 years. In *Andrewes* v. *George* (1) the testator bequeathed his residue on trust for his wife for life, and after her death for his five children in equal shares, and after reciting that he had made advances to some of them directed that his trustees before they distributed his estate should deduct from his sons' and daughters' shares "so much money as had been "advanced and lent to him her or them by him so as to render "their shares quite equal and to the amount they would have "been entitled to had he not advanced the said sums of money "but that the whole had been remaining at his decease and "been attendant on the directions of his will." He died on September 27, 1819, and his widow survived him by a few months only. A decree for administration of his estate was duly made, and the Master was directed to inquire and state the amount advanced by the testator in his life-time to his several children and to compute interest on such advances at the rate of 4 per cent. per annum from the time of the testator's decease, but without prejudice to the question whether any and what interest should be charged thereon, and whether from the time of the testator's decease or from any later period. The Master duly certified and the cause then came on to be heard for further directions on the question from what period the interest on the advances ought to be computed. The Vice-Chancellor said that the testator meant that the deductions in respect of the advances should be made at the time when his property would become divisible, namely, the death of his widow, and accordingly directed interest at 4 per cent. to be computed on the advances from that date.

The significance of this case is that from first to last there is no suggestion of any other method of fairly adjusting the rights of the beneficiaries except by charging interest on advances, the only question, on which it may be observed that the reporter makes an interesting note, being the date from which interest is to run. (1)

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(1) (1830) 3 Sim. 393.

It is clear that the rule, artificial and arbitrary though it might be, was already established as the fair way of dealing with the matter. From that time onwards there must have been countless administrations in which advanced sums had to be brought into hotchpot whether by virtue of a testator's directions, or by the application of the rule against double portions, and it is fair to assume, since no hint to the contrary is to be found in any case, that the rule as I have stated it was adhered to both by the Court in administering estates and in administrations out of Court. I refer to only one case—*In re Rees.* (2) In that case Sir George Jessel M.R. had to consider only the date from which interest must be charged on sums brought into hotchpot, but it is impossible to read his judgment without feeling a conviction that he had never contemplated any way of adjusting the rights of advanced and unadvanced beneficiaries with regard to income other than that of charging interest against advances.

It was in this state of the law that *In re Hargreaves* (3) came before Joyce J. and the Court of Appeal. In that case the questions raised by the summons were whether, under the provisions contained in the will and the codicils of the testator, the advanced children were liable to pay interest on the advances made to them by their father in his lifetime and, if so, whether such interest should be at a rate varying according to the actual income derived from the residuary estate, or at a fixed, and, if so, what fixed rate; and, secondly, from what date such interest should run. Not yet is there a hint of any other method than of charging interest for adjusting the rights of beneficiaries. In the judgment of Joyce J. there is indeed a single passage which somewhat uncertainly suggests an alternative method, but the judgment as a whole is decisive in favour of the established practice of charging interest at 4 per cent. on advances which had to be brought into account. The date from which interest should run in view of the fact that a large annuity was payable out of residue, and the rate at which it should be charged, were the substantial questions argued. Against his decision the advanced children appealed. It does not appear from the report what their argument was, but it would seem that neither party argued for that which the Court decided: see per Sargant J. in *In re Forster-Brown.*(1)

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(1) 3 Sim. 395.

(2) (1881) 17 Ch. D. 701.

(3) 88 L. T. 100.

In effect, that decision was that for the purpose of ascertaining the proportions of the settled shares of the testator's children the value of his net residuary estate at the date of his death ought to be ascertained, that there should be added thereto the amount of the several advances made to his children, that the actual income received from the testator's death ought to be divided in the respective proportions so ascertained, and that any calculation of interest was accordingly unnecessary. Here, then, for the first time was a decision which imported a new method of adjusting the rights to income of advanced and unadvanced beneficiaries. Was it, then, a decision which turned solely on the provisions of the will which the Court had to consider and applied solely to the estate thereby disposed of, or was it a decision of general application substituting a new rule for one which had so long been established?

On this question I should have entertained little doubt but for the authorities to which I must presently refer. It is in my judgment unlikely in the extreme that the Court should have intended to substitute a new rule of general application, and it is interesting that both in the judgment of Romer L.J. and that of Cozens-Hardy L.J. the opening reference is to the express provision in the testator's will whereby he directed the ascertainment of a child's share as at his death with a valuation as at that date of any stocks, funds or securities which were to be brought into account. A general rule of administration must, of course, give way to clear directions in a testator's will, or to any directions which cannot be carried out consistently with its application. So I read the decision in *In re Hargreaves*. (1) It is, I think, a decision resting solely on the particular language of the testator's will, and though there are some observations towards the end of the judgment of Romer L.J., which are of a more general character, they were not necessary to his decision and cannot, in my judgment, be regarded as justifying a departure from the old rule in any case in which the peculiar features of *In re Hargreaves* (1) are not present.

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(1) [1914] 2 Ch. 584, 591.

In coming to this conclusion I am supported by the authority of Sargant J. in *In re Forster-Brown* (2), and again in *In re Tod*. (3) In *In re Poyser* (4), and again in *In re Craven* (5) Warrington J. did not adopt the method prescribed in *In re Hargreaves* (1) but reverted to the ancient way. Younger J. took the same course in *In re Cooke*. (6) It is true that in nearly all these cases there were points of difference from *In re Hargreaves* (1) either in the language of the will, or the circumstances of the estate being administered. They are indicated by Farwell J. in his judgment in *In re Mansel*. (7) But I cannot read the judgment of Sargant J. in *In re Tod* (3) as anything but an unequivocal decision that the rule, if it be a rule, laid down by *In re Hargreaves* (1) ought to be applied only in cases in which the will on its true construction so directs, and I am, I think, entitled to take the same course, though I do so with the greatest hesitation in view of the decision of Farwell J. in *In re Mansel*. (7) I have not overlooked the decision of Eve J. in *In re Hart* (8), but as to that I would adopt what Sargant J. said in *In re Tod*. (3) In *In re Mansel* (7) Farwell J. felt himself bound to apply the rule in *In re Hargreaves* (1) unless it should be excluded on some substantial ground, and indicated that later authorities showed that there were at least two grounds on which it might be excluded, the first a difficulty in arriving at a fair and proper valuation of the residuary estate, or of a substantial part thereof, and the second the fact that the

(1) 88 L. T. 100.
(2) [1914] 2 Ch. 584, 591.
(3) [1916] 1 Ch. 567.
(4) [1908] 1 Ch. 828.
(5) [1914] 1 Ch. 358.
(6) [1916] 1 Ch. 480.
(7) [1930] 1 Ch. 352.
(8) 107 L. T. 757.

testator appeared not to contemplate an immediate division of the estate. I respectfully agree that these were grounds on which the rule in *In re Hargreaves* (1) has been excluded, and I have no doubt that there may be other grounds on which other judges would find it possible to distinguish that case and exclude its rule.

But where, then, are the uniformity and certainty which are the desiderata in a rule of administration? What is the test of a " fair and proper valuation " ? A heavy burden is placed on executors if they must determine whether this consideration is satisfied so as to make the rule applicable. What for the purpose of the rule is a " substantial portion " of the residuary estate which is incapable of such a valuation ? Assume that the property is susceptible of a fair and proper valuation at the death, by reference, for instance, to the Stock Exchange quotations, is it relevant that it is of a speculative character and that its value may greatly appreciate or depreciate between the death and the date when any distribution or appropriation can be made ? If, again, the rule may be excluded where an immediate division is not contemplated, is it excluded only where division is delayed by the interposition of a life interest, or is it excluded also where the delay is due to difficulties in getting in the estate which may be for a considerable period ? Even if the decision is delayed for no longer than the executors' year, I see no reason why, if any delay is sufficient, this should not be sufficient to exclude the rule. It is the fact that some delay occurs, and some income may be derived from the estate, for the benefit of the residuary legatees before distribution, which makes an adjustment necessary. What logic dictates a different rule for a long and a short delay ? And what is short and what is long ?

These and similar considerations which vividly illustrate the necessity for a settled rule, and the confusion which arises from refinements on it lead me to the conclusion that, if I may, I must regard the decision in *In re Hargreaves* (1) as governing only cases in which a testator uses language of

(1) 88 L. T. 100.

similar import to that used in the will there under consideration, and in other cases apply the ancient rule. In my judgment it is permissible for me to take this course. As I have already said, it is only with the greatest reluctance that I take a different view from that expressed by Farwell J. in *In re Mansel.* (1) I do not think that I should permit myself to do so were it not for the support that I get from the repeated expressions of Sargant J. The advanced beneficiaries will accordingly be charged with interest at 4 per cent. on their advances from the death of the testator, the amount of such advances being determined by the value of the settled securities as at the date of settlement.

Solicitors: *Williams & James; Trower, Still & Keeling.*

(1) [1930] 1 Ch. 352.

H. L. L.

In re DAVID MOSELEY AND SONS, LIMITED.

SIMONDS J.

1939 May 11.

[1938. D. 5386.]

(MANCHESTER DISTRICT REGISTRY.)

Company—Articles of Association—Rotation and retirement of directors —Construction.

A company, which had governing and managing directors, provided by its articles of association that at every annual general meeting one-third of the directors (not being governing or managing directors), or, if their number was not a multiple of three, then the nearest number to, but not exceeding, one-third should retire from office, the director or directors who had been longest in office to be the ones to retire.

The number of ordinary directors having been reduced to two in number :—

Held, that neither of them was bound to retire from office.

SUMMONS.

The plaintiff, Michael Grange Moseley, was one of the directors of David Moseley and Sons, Ld., and he took out this summons against the company to have determined the question whether upon the true construction of art. 94 of the company's articles of association, and in the events which had happened, he was bound to retire by rotation at the annual general meeting of the company held on July 19, 1938.

The company was formed in 1902. Art. 94 was as follows :—

"ROTATION OF DIRECTORS.

"At the ordinary general meeting to be held in the year "1904 and at every succeeding ordinary general meeting "one-third of the directors (other than the governing directors "and managing director or directors), or, if their number is "not a multiple of three, then the number nearest to but "not exceeding one-third, shall retire from office."

Art. 95 provided that the one-third or other nearest number to retire should in 1904 be determined by lot, and that in every subsequent year the director or directors who had been longest in office should retire.

There were at the material date only two ordinary directors, the other directors being governing or managing directors. The plaintiff contended that the effect of art. 94 was that no director was bound to retire at the annual general meeting.

J. Pennycuick for the plaintiff. The case turns entirely on the true construction of art. 94. This requires one-third of the number of directors, or, if they are not a multiple of three, then the number nearest to, but not exceeding one-third, to retire annually in rotation. Where, as at present, the number of ordinary directors is reduced below three, the article can have no sensible meaning, and is inapplicable. This is a common form of article to be found in Palmer's Company Forms from 1912 on, but the last edition (1938) contains an added proviso that would meet a case like the present.

Wilfrid Hunt for the defendants. The article should not be construed by the Court so as to make it entirely unworkable if the number of directors is reduced below three. If there are three directors, or even only two, one should retire annually. It should not in the circumstances be treated as a nullity. The article should be read as if the words " not exceeding one-third " were left out of it.

SIMONDS J. This summons raises a question of the construction of the articles of association of David Moseley and Sons, Ld. The plaintiff, Michael Grange Moseley, asks the Court to determine whether or not on the true construction of art. 94 of the articles of association he was liable to retire from the office of director in the year 1938.

That raises a somewhat curious point which one would have thought would have come up for decision long before this, but apparently there is no authority to assist me. By the articles of association of the company it is provided by art. 80 that the number of directors shall not be less than three or more than five. Art. 81 provides who should be the first directors, and art. 82 provides that each of the three men named in the preceding article should, subject to certain conditions, be a governing director of the company. To certain other articles, which are more or less in common form, I need not refer. Then comes art. 94, which is in common form: "At the ordinary general meeting to be held in the "year 1904, and at every succeeding ordinary general meeting, "one-third of the directors (other than the governing directors "and managing director or directors), or, if their number is "not a multiple of three, then the number nearest to but "not exceeding one-third, shall retire from office."

It is to be observed that the phrase there is "their number," and it is said that that phrase must mean the whole body of directors, including the governing directors. I do not think that that can be the true meaning. In my opinion, "their number" means the directors referred to above other than the two governing directors and the managing director.

Art. 95 deals with who were to be the one-third: "The "one-third or other nearest number to retire at the ordinary "meeting to be held in the year 1904 shall unless the directors "agree among themselves be determined by lot, and in "every subsequent year the one-third or other nearest number "who have been longest in office shall retire."

Art. 96 states: "The company at any general meeting at "which any directors retire in manner aforesaid shall fill up "the vacated office by electing a like number of persons to "be directors and may fill up any other vacancies."

Arts. 97 to 100 contain further provisions with regard to the election of directors. The question which arises is this: in 1936 there were six directors, of whom three were governing directors, one a managing director and two were ordinary directors. Art. 94 has no reference to the governing directors or managing director. The question is whether it has any operation with regard to the plaintiff as an ordinary director, and the ordinary director who had been longer in office within the meaning of this article than the other ordinary director.

Before I come to state my views on the construction of this article it is relevant to observe that the words which cause the difficulty (" but not exceeding one-third ") do not occur in Table A of the Companies Act, 1929. Art. 73

in Table A is in this form: "At the first annual general "meeting of the company the whole of the directors shall "retire from office, and at the ordinary general meeting in "every subsequent year one-third of the directors for the "time being, or if their number is not three or a multiple of "three, then the number that is nearest one-third, shall "retire from office." In Palmer's Company Forms the article, which so far as I know is to be found in all the editions before the 1938 edition, is in this form: "At the ordinary "general meeting to be held in the year [blank] and at every "succeeding ordinary general meeting one-third of the directors, "or if their number is not a multiple of three, then the number "nearest but not exceeding one-third, shall (subject to the "provisions of article 97), retire from office and shall be "eligible for re-election." Therefore, so far in Palmer's Forms there is no provision for the difficulty which arises in this case. The 1938 edition adds this proviso: "Provided "always that if in any year the number of directors who "are subject to retirement by rotation shall be two, one of "such directors shall retire." So it would appear that between the time of the preceding edition and the edition of 1938 the doubt which has to be resolved in this case had occurred to the learned editor. The view put forward on behalf of the plaintiff is this: he says that, where there are only two directors to whom art. 94 can apply, the article can have no application because it is not a case in which one can speak of one-third of the directors for there are not three directors. It is not a case to which the alternative head of the article can refer because though it satisfies the condition that the number of directors is not a multiple of three, there is no number of directors which does not exceed one-third, for one is more than one-third of two. Therefore a number cannot be found which is nearer to but does not exceed one-third of two.

On the other side it is said that the words "not exceeding one-third" can have no relevance or meaning and must be excluded where the number of directors is only two, and that that must be done because the purpose of art. 94 is to provide for the rotation of the directors and the retirement of some one or more directors.

I must admit that in the course of the argument my mind fluctuated a good deal between these views, but, on the whole, I have come to the conclusion that the doubt which obviously entered the mind of the learned editor of Palmer's Company Forms was justified, and that where there are only two directors the condition of art. 94 in this form is not satisfied. The article, in my judgment, does not provide for the retirement of a director unless one of two conditions is satisfied: either there must be a number which is one-third of the directors, or there must be a number which is nearest to but does not exceed one-third. Here it is clear that neither of those conditions is satisfied. There are two directors and, therefore, you cannot find a number which is one-third. There are two directors and, therefore, you cannot find a number which is nearest to but does not exceed one-third. Although it may be that the general intention of this particular article is not satisfied, the answer is that the articles will have to be altered to give effect to what may well be the intention of the company.

I must therefore answer the question asked by saying that on the true construction of article 94 of the articles of association of the defendant company and in the events which have happened the plaintiff did not retire from office by rotation at the annual general meeting of the defendant company held on July 19, 1938.

Solicitors: *Slater & Co., Manchester*; *Skelton & Co., Manchester.*

H. L. L.

MORTON J.

1939
March 14.

SUPERMA, LIMITED, AND SARTORY *v.* TENCONI.

[1937. S. 3919.]

Patent—Infringement—Pleadings—Defence struck out before trial—Validity—Action "proceeding to trial"—Patents and Designs Act, 1907 *to* 1938 (7 *Edw.* 7, *c.* 29; 4 *&* 5 *Geo.* 5, *c.* 18; 9 *&* 10 *Geo.* 5, *c.* 80; 18 *Geo.* 5, *c.* 3; 22 *&* 23 *Geo.* 5, *c.* 32; *and* 1 *&* 2 *Geo.* 6, *c.* 29), *s.* 35*—Rules of the Supreme Court, Order* XXXI., *r.* 21; *Order* LIII.A, *r.* 20.

By s. 35 of the Patents and Designs Acts, 1907 to 1938: "In "an action for infringement of a patent, the court may certify "that the validity of any claim in the specification of the patent "came in question; and, if the court so certifies, then in any 'subsequent action for infringement of such claim the plaintiff "in that action on obtaining a final order or judgment in his "favour shall, unless the court trying the action otherwise directs, "have his full costs, charges, and expenses as between solicitor "and client so far as that claim is concerned."

By Order XXXI., r. 21, of the Rules of the Supreme Court: "If any party fails to comply with any order to answer interro-"gatories, or for discovery . . . . of documents, ... he shall "be liable . . . . if a defendant, to have his defence, if any, "struck out, and to be placed in the same position as if he had "not defended, and the party interrogating may apply to the "court or a judge for an order to that effect, and an order may "be made accordingly."

By Order LIII.A, r. 20: "On taxation of costs in any action "or counterclaim for infringement of patent or in any petition "for revocation of a patent under section 25 of the principal "Act or in any counterclaim for revocation of a patent under "section 32 of the principal Act, the following provision shall "apply, that is to say:—If the action petition or counterclaim "proceeds to trial on any patent, no costs shall be allowed in "respect of any issue raised in the particulars of breaches or "particulars of objections and relating to that patent to the "parties delivering the same respectively except in so far as "such particulars are certified by the court to have been proven "or to have been reasonable and proper without regard to the "general costs of the case, but subject as aforesaid the costs of "the issues raised by the particulars of breaches and the parti-"culars of objections shall be in the discretion of the Taxing "Master."

In an action for an injunction to restrain infringement of a patent the defendant did not comply with an order to deliver an affidavit of documents and the defence and counterclaim were therefore struck out, and the defendant was placed in the same position as if he had not defended or counterclaimed. At the trial the plaintiffs asked for a certificate that the validity of the patent came in question under s. 35, and tendered evidence to establish the validity. The Court granted an injunction and an inquiry as to damages, ordered delivery up or destruction of infringing articles, gave the plaintiffs the costs of the action, reserved the costs of the inquiry, and ordered the defendant to pay the costs of the counterclaim, but:—

Held, (1.) that the case did not come within s. 35, and that the Court would not grant a certificate, as the statements in it would not be accurate;

(2.) that the action had not "proceeded to trial" within the meaning of Order LIII.A, r. 20, and that the costs of the issues raised by the particulars of breaches were in the discretion of the Taxing Master.

Babcock and Wilcox, Ld. v. *Water Tube Boiler and Engineering Co.* (1910) 27 R. P. C. 626, followed.

WITNESS ACTION.

In this action for an injunction to restrain infringement of a patent the defence and counterclaim had been struck out because the defendant had not complied with an order to deliver an affidavit of documents. When the action came on for trial, the plaintiffs asked the Court for a certificate that the validity of the patent came in question under s. 35 of the Patents and Designs Acts, 1907 to 1938.

The striking out of the defence and counterclaim put the defendant in the same position as he would have been in had he not defended, or counterclaimed in, the action.

Evidence to establish the validity of the patent was tendered.

Geoffrey W. Tookey for the plaintiffs. In *J. B. Brooks & Co., Ld.* v. *E. Lycett, Ld.* (1) Buckley J. granted an injunction and a certificate that the validity of the patent came in question in the action and, in granting the certificate, attached importance to the fact that the defence had disputed the validity. In *Blatchford* v. *Cory and Grundy, Ld.* (2) the validity of the patent was denied in the pleadings and the parties settled the case: and the defendant accepted a licence, giving an undertaking until it should be granted. P. O. Lawrence J. asked if it was the practice to grant a certificate of validity unless there had been a real contest, and was informed that it was the practice

(1) (1903) 20 R. P. C. 390. (2) (1921) 38 R. P. C. 412.

where the parties had, as in the case before him, been at arm's length until the trial.

Evidence of validity was then given and P. O. Lawrence J. granted a certificate. In *Descombes and Arondel* v. *Lestor and Parton* (1) the validity of the patent was disputed on the pleadings but, as a result of reports of expert witnesses for the defendants, was not disputed in Court; and, on expert evidence being given, Eve J. granted a certificate of validity. [He referred to Fletcher Moulton on Patents, at p. 199.]

MORTON J. This action relates to a patent for curling and waving the hair, and raises a question of some importance as to the construction of s. 35 of the Patents and Designs Acts, 1907 to 1938.

The writ was issued on December 3, 1937, and the plaintiffs claim an injunction to restrain the defendant, his servants and agents, from infringing the patent, which is Letters Patent No. 225,256; and an inquiry as to damages and delivery up and costs.

The statement of claim was delivered on December 21, 1937. It is alleged therein that the plaintiff Peter Sartory is the registered legal owner of the patent in question, and that the plaintiffs Superma, Ld., are exclusive licensees under the said letters patent. By para. 2 it is alleged that the said letters patent are valid and subsisting. By para. 3 it is alleged that the defendant has infringed and threatens and intends to infringe the letters patent in manner appearing in the particulars of breaches, and the plaintiffs claim the same relief in substance as the relief claimed by the writ.

On February 2, 1938, the defendant delivered his defence. Para. 2 is: "Letters Patent No. 225,256 is and at all matereial "times has been invalid by reason of the matters in the "herewith delivered particulars of objections appearing." Then there followed a counterclaim whereby the defendant repeated para. 2 of his defence, and counterclaimed for the revocation of the said letters patent. The particulars of objections cover a wide field, and I need not refer to them in detail.

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(1) (1931) 48 R. P. C. 473.

On June 30, 1938, the defendant was ordered (inter alia) to file a full and sufficient affidavit stating whether he had or had not in his possession or power any, and, if any, what documents relating to the matters in question in this action and counterclaim and accounting for the same.

The action was set down in the witness list before January 25, 1939. On January 25, 1939, the defendant having failed to comply with that portion of the order of June 30 relating to the filing of an affidavit of documents, it was ordered that the defence and counterclaim delivered by the defendant on February 2, 1938, be struck out, and that the defendant be placed in the same position as if he had not defended or counterclaimed in this action. That order was made in accordance with the provisions of Order XXXI., r. 21, which is: "If any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he "shall be liable to attachment. He shall also, if a plaintiff, be "liable to have his action dismissed for want of prosecution, "and, if a defendant, to have his defence, if any, struck out, "and to be placed in the same position as if he had not "defended, and the party interrogating may apply to the "court or a judge for an order to that effect, and an order "may be made accordingly." It is to be observed that the effect of the order of January 25, 1939, was that the defendant was placed in the same position as if he had not defended. The defence and counterclaim being struck out, the position is that there is no defence and no counterclaim.

The action has now come on for trial, and Mr. Tookey, for the plaintiffs, has asked me to give a certificate under s. 35 of the Patents and Designs Acts, 1907 to 1938, that the validity of the patent came in question. He tendered evidence to establish the validity of the patent in case I should think that I could give a certificate under the section. The first question that arises is: Did the validity of any claim of this patent come in question within the meaning of s. 35? If it did not, it would, of course, be quite wrong to grant the certificate for which the plaintiffs ask.

Mr. Tookey has referred me to three cases. The first of these was *J. B. Brooks & Co., Ld.* v. *E. Lycett, Ld.* (1) In that case, which was before Buckley J., the defendant, in the pleadings, denied the validity of the patent but did not appear at the trial. The allegations in the statement of claim being denied by the defence, the plaintiffs called evidence to prove their case, and Buckley J. granted an injunction and other relief. On the following day counsel for the plaintiffs asked for a certificate that the validity of the patent came in question in the action, and the following observations were made: (Buckley J.): "I presume the validity was disputed by the Defence?" (Counsel): "Yes." (Buckley J.): "And there was evidence "given as to the patent being valid?" (Counsel): "Yes." Buckley J. on that granted the certificate. It would appear that Buckley J. attached importance to the fact that the validity of the patent was disputed by the defence.

The next case is *Blatchford* v. *Cory and Grundy, Ld.* (2) In that case the validity of the patent was denied in the pleadings, but when the matter came to trial it was stated by counsel for the plaintiffs that the parties had come to terms on the basis of the defendants accepting a licence and giving an undertaking until the grant of it. Counsel then stated that he proposed to call evidence as to the validity of the patent and to ask for judgment, on terms which had been put into writing, and for a certificate of validity. P. O. Lawrence J. asked: "Is it the "practice to grant a certificate unless there has been a real "contest?" The answer was: "Yes, when the parties have "been at arm's length, as they have here, until the trial." Evidence was then given to the effect that the patents were valid, and P. O. Lawrence J. granted the certificate which was asked for. It is to be observed that, here again, the validity of the patent was denied on the pleadings and the parties came into Court with that denial on the record.

The last case was *Descombes and Arondel* v. *Lestor and Parton.* (3) In that case, again, the validity of the patent was disputed on the pleadings, but at the hearing counsel for the defendant said: "As a result of reports made by expert witnesses

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(1) 20 R. P. C. 390.
(2) 38 R. P. C. 412.
(3) 48 R. P. C. 473.

"acting for the defendants, I have advised the defendants that "they cannot hope to succeed on the issue of invalidity and "I do not now propose to contest the validity of the letters "patent in suit." Then counsel for the plaintiffs asked for a certificate under s. 35 and said that there was authority for granting such a certificate where the defendants had appeared and submitted to judgment, and he suggested that the Court ought to be satisfied that there had been no collusion between the parties. An expert witness was called, and Eve J. said: "I think on that evidence the plaintiffs are entitled to a "certificate of validity." Mr. Tookey has also referred me to a passage in Fletcher Moulton on the Law and Practice relating to Letters Patent for Inventions, which was published in 1913. That passage is on p. 199, and contains a useful summary of the decisions under s. 35.

I can well appreciate that if, at the time the action comes on for hearing, there is still an allegation of validity in the statement of claim and a denial of validity in the defence, it may well be said that the validity of the patent has come in question, notwithstanding that at the hearing no attack was made on the validity of the patent and, the defendant either failed to appear or appeared and said that he could not contest its validity; but in the present case, in my view, it would not be right to say that the validity of any claim in the specification of this patent came in question. Having regard to the terms of Order XXXI., r. 21, and in the events which have happened, the position is that the defendant is in the same position as if he had not defended, and that when the matter comes before me there is no defence and no counterclaim, and there is a statement of claim containing undisputed allegations. I do not think the present case comes within the wording of s. 35 of the Patents and Designs Act, 1907 to 1938. Therefore I do not propose to grant the certificate asked for, as I think the statement in it would not be accurate.

[After discussion, his Lordship granted an injunction to restrain the defendant, his servants and agents, from infringing Letters Patent No. 225,256, and an inquiry as to damages, and ordered delivery up or destruction on oath of all articles in the defendant's possession or under his control, constructed in infringement of the letters patent. His Lordship gave the plaintiff the costs of the action, reserved the costs of the inquiry, and ordered the defendant to pay the costs of the counterclaim.]

Geoffrey W. Tookey. The only other question is as to a certificate with regard to the particulars of breaches. [He referred to Order LIII.A, r. 20.] If the Court holds that this action, in the events which have happened, has not proceeded to trial, everything is left to the discretion of the Taxing Master; but if the Court thinks the action has proceeded to trial, the plaintiffs ask for a certificate that their particulars of breaches were either proven or were reasonable and proper. [He referred to *British Foreign and Colonial Automatic Light Controlling Co., Ld.* v. *Metropolitan Gas Meters, Ld.* (1), and *Babcock and Wilcox, Ld.* v. *Water Tube Boiler and Engineering Co.* (2)]

MORTON J. A further question has arisen in this action, namely, whether, in the circumstances which I have already detailed in my judgment, this action has proceeded to trial within the meaning of Order LIII.A, r. 20. If the action did not proceed to trial within the meaning of that rule, the costs of the issues raised by the particulars of breaches would be in the discretion of the Taxing Master. The position is that I have given judgment in favour of the plaintiffs, but, owing to the absence of any defence, there has been no trial of the issues in the action. In my view, in those circumstances, the action has not proceeded to trial within the meaning of the rule. Mr. Tookey has referred me to two cases before Warrington J., as he then was. The first is *British Foreign and Colonial Automatic Light Controlling Co., Ld.* v. *Metropolitan Gas Meters, Ld.* (3) In that case Warrington J. states the effect of Order LIII.A, r. 22, which was in similar terms to what is now Order LIII.A, r. 20, and states the reason for this rule in the following terms: "The reason of course is obvious,

(1) (1912) 29 R. P. C. 303.
(2) 27 R. P. C. 626.
(3) 29 R. P. C. 303, 306.

MORTON J.

1939

SUPERMA, LD., AND SARTORY v. TENCONI.

"and it is this: that unless an action is fought out—that is "to say, unless the trial is actually proceeded with—the judge "has no means of determining whether the particulars of "objections are reasonable or not, and accordingly the rule in "that case leaves it to the Taxing Master to look into them "and to say whether they are or are not reasonable, and "whether the costs ought to be allowed." I entirely accept that statement of the reason for the rule. Further light is thrown on the matter by the judgment of Warrington J. in *Babcock and Wilcox, Ld.* v. *Water Tube Boiler and Engineering Co.* (1) In that case the plaintiffs, when the action came on for trial, submitted to judgment for the defendants with the costs of the action; so that there was in that case a judgment, just as there is in the present case. Warrington J. says: "The consolidated actions come on for trial, but do not proceed "to trial, because as soon as the actions are called on, the "plaintiffs state that they submit to judgment for the "defendants with costs. That seems to me to be a case "falling within rule 22 of Order LIII.A, namely, that the action "does not proceed to trial." I can see no real distinction between the case to which I have just referred and the present case. The action came on for trial, but did not proceed to trial in the sense that the issues had to be tried and determined, because there was no defence on the record. In these circumstances I think it is clear that this action has not proceeded to trial within the meaning of Order LIII.A, r. 20, and the costs of the issues raised by the particulars of breaches are in the discretion of the Taxing Master.

Solicitors: *Berrymans.*

K. R. A. H.

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(1) 27 R. P. C. 626, 628.

MORTON J.

1939

April 21.

In re THE ANTOFAGASTA (CHILI) AND BOLIVIA RAILWAY COMPANY, LIMITED'S TRUST DEED.

THE COMPANY *v.* SCHRÖDER AND OTHERS.

[1939. A. 189.]

Company—Debenture stock—Redemption—Fixed date—Re-issue—Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 75, *sub-ss.* 1, 2, 3, 5.

Under s. 75, sub-s. 1, para. (*a*), of the Companies Act, 1929, a company which has redeemed debentures can, unless (inter alia) "any provision to the contrary, whether express or implied, is "contained in . . . . any contract entered into by the company, ". . . ." re-issue the debentures, either by re-issuing the same debentures or by issuing other debentures in their place.

A company issued four series of debenture stock, the first repayable at par only on a winding-up, the second and third redeemable on January 1, 1940, and the fourth redeemable on July 1, 1960. A trust deed executed in 1910 constituted the fourth series a first specific charge on certain mortgage bonds and, by clause 9, provided (inter alia) that the company's undertaking and assets should stand charged with the payment of the stock and interest on it and all other moneys secured by the deed, and that the charge should rank after the other three stocks, but that the company should not execute any mortgage or give any other charge, without the consent of the trustees of the deed, to rank before or with the charge created thereby, except as thereinbefore provided.

On a summons by the company to determine whether, on the true construction of s. 75, it had power to redeem the second and third debenture stocks and re-issue them with a different date for redemption:—

Held, (1.) that the power to re-issue the debentures could not extend to give the company power to issue debentures which were not the same, in their terms, as the original debentures;

(2.) that the intention of s. 75 was not that the debentures could be made perpetual debentures by the postponement, on a re-issue, of the date for redemption. Its intention was to give power only to revive the original transaction, not power to enter into a new and different transaction;

(3.) that the debentures which were re-issued, or those which were issued in their place, must contain the same provisions as to redemption as the original debentures which had been redeemed. Therefore, on the true construction of the section, the company, if it redeemed the second and third stock, could re-issue only the same debentures or other debentures having the same provisions in every respect, and the debentures so re-issued, or those issued in their place, could not bear a date for redemption different from the date for redemption of the debentures which they replaced.

MORTON J.

1939

THE ANTOFAGASTA (CHILI) AND BOLIVIA RY. CO.'S TRUST DEED, *In re.*

THE COMPANY *v.* SCHRÖDER.

ADJOURNED SUMMONS.

The Antofagasta (Chili) and Bolivia Railway Company, Ld., (hereinafter called "the company") issued four series of debenture stock, all outstanding at the date of the summons. The first was repayable, only on winding-up, at par. The second and third were redeemable on January 1, 1940, and the fourth was redeemable on July 1, 1960. A trust deed dated August 16, 1910, and constituting the fourth series a first specific charge on certain mortgage bonds, provided, by clause 9: "The undertaking and other assets for the time "being of the company whatsoever and wheresoever including "its uncalled capital for the time being (if any) shall stand "charged with the payment of the stock and the interest "payable thereon and all other moneys hereby secured and "the company hereby charges the same accordingly and such "charge shall be a floating security and shall so far as regards "so much of the undertaking as is charged in favour of the "holders of the first, second and third stocks rank after and in "subordination thereto and to the securities for the same but "the company shall not execute any mortgage or give any "other charge without the consent of the trustees to take "precedence of or rank equally with the charge hereby created "except as hereinbefore provided."

On January 20, 1939, the company issued this summons to determine whether, on the true construction of s. 75 of the Companies Act, 1929 (1), it had power to redeem the second

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(1) By s. 75, sub-s. 1, of the Companies Act, 1929: "Where "either before or after the commencement of this Act a company has redeemed any debentures previously issued, then— "(*a*) unless any provision to the "contrary, whether express or "implied, is contained in the "articles or in any contract "entered into by the company; "or (*b*) unless the company has, "by passing a resolution to that "effect or by some other act, "manifest its intention that the "debentures shall be cancelled, "the company shall have, and "shall be deemed always to have "had, power to re-issue the debentures, either by re-issuing the "same debentures or by issuing "other debentures in their place."

By sub-s. 2: "On a re-issue of "redeemed debentures the person "entitled to the debentures shall "have, and shall be deemed "always to have had, the same "priorities as if the debentures "had never been redeemed."

By sub-s. 3: "Where a

MORTON
J.
1939
The Antofagasta (Chili) and Bolivia Ry. Co.'s Trust Deed, *In re.*
The Company *v.* Schröder.

and third debenture stock and re-issue it with a different date for redemption.

H. Wynn Parry K.C. and *W. Gordon Brown* for the company. The company's power under s. 75, sub-s. 1, includes power to re-issue debentures with a different date for redemption. The wording of the sub-section enables the company to re-issue any debentures, including those redeemed on the date of maturity. Neither expressly nor by implication does the sub-section restrict the power to debentures redeemed before the date for redemption. Thus, the company must have power to make the date for redemption a later date.

A. Andrewes Uthwatt for the trustees of the deed. The power to re-issue the debentures cannot give to the company power to issue debentures which are not the same, in their terms, as the original debentures. The company can either re-issue the same piece of paper or issue, in its place, another piece of paper which must contain the same provisions.

Morton J. The company issued the following four series of 1,000,000*l.* 4 per cent. debenture stock repayable at par, only debenture stock, all outstanding at the date of the summons: first, in the event of a winding-up ; secondly, 1,000,000*l.* 4½ per cent.

"company has power to re-issue "debentures which have been "redeemed, particulars with respect to the debentures which "can be so re-issued shall be "included in every balance sheet "of the company."

By sub-s. 5 : "The re-issue of "a debenture or the issue of "another debenture in its place "under the power by this section "given to, or deemed to have "been possessed by, a company, "whether the re-issue or issue was "made before or after the passing "of this Act, shall be treated as "the issue of a new debenture for "the purposes of stamp duty, but "it shall not be so treated for the "purposes of any provision limiting the amount or number of "debentures to be issued : Provided that any person lending "money on the security of a "debenture re-issued under this "section which appears to be duly "stamped may give the debenture "in evidence in any proceedings "for enforcing his security without "payment of the stamp duty or "any penalty in respect thereof, "unless he had notice or, but for "his negligence, might have discovered, that the debenture was "not duly stamped, but in any "such case the company shall be "liable to pay the proper stamp "duty and penalty."

debenture stock, maturing for redemption at a premium of 5 per cent. on January 1, 1940, and hereinafter called the second stock; thirdly, 1,500,000*l.* 5 per cent. debenture stock, maturing for redemption at a premium of 10 per cent. on January 1, 1940, and hereinafter called the third stock, and, fourthly, 1,408,950*l.* 5 per cent. debenture stock, maturing for redemption at a premium of 10 per cent. on July 1, 1960, and hereinafter called the Bolivia stock.

By a trust deed of August 16, 1910, the Bolivia stock was constituted a first specific charge upon certain mortgage bonds. By clause 9 of the trust deed: " The undertaking and other "assets for the time being of the company whatsoever and "wheresoever including its uncalled capital for the time being "(if any) shall stand charged with the payment of the stock "and the interest payable thereon and all other moneys hereby "secured and the company hereby charges the same accordingly "and such charge shall be a floating security and shall so far "as regards so much of the undertaking as is charged in favour " of the holders of the first second and third stocks rank after "and in subordination thereto and to the securities for the "same but the company shall not execute any mortgage or "give any other charge without the consent of the trustees to "take precedence of or rank equally with the charge hereby "created except as hereinbefore provided."

The second and third stock being redeemable, as I have said, on January 1, 1940, the company has issued this summons, to which the trustees of the Bolivia stock are defendants. The summons raises a number of somewhat lengthy questions, but in the course of the discussion before me it appeared that the short and important point, which the parties wish to have decided, is whether, on the true construction of s. 75 of the Companies Act, 1929, the company has power to redeem the second and third debenture stock and re-issue it with a different date for redemption.

By s. 75, sub-s. 1, of the Companies Act, 1929: [His Lordship read it, and read also sub-ss. 2, 3 and 5, and continued:] It is not suggested that sub-s. 6 throws any light on the question which I have to decide.

Mr. Wynn Parry and Mr. Gordon Brown, for the plaintiff company, contend that the power of the company to re-issue debentures empowers them to re-issue with a different date for redemption. Mr. Wynn Parry put his argument in this way: that under sub-s. 1 the company could re-issue any debentures, including those which it redeemed on the date fixed for redemption, and that the power was not restricted to debentures redeemed prior to the date fixed for redemption. He says that there is no such express restriction in the sub-section, and no words in the sub-section which, by necessary implication, raise such a restriction. Then he goes on to say that, if this part of his argument is correct, the company must have power to make the date of redemption a later date.

The point is a very short one. I have no doubt that it is also a very important one, but it seems to me to turn upon the words, " power to re-issue the debentures." The sub-section gives power to re-issue the debentures in either of two different ways, by re-issuing the same debentures, or by issuing other debentures in their place. For my part I cannot see that the power to re-issue debentures can extend to give the company power to issue debentures which are not the same in their terms as the original debentures. I think that Mr. Andrewes Uthwatt, for the defendants, is right when he says that there are two ways in which the company can carry out the transaction. It can either re-issue the same piece of paper, or issue another piece of paper in its place which must contain the same provisions. It seems to me that, if the company has power to make the variation which Mr. Wynn Parry suggests, such a variation would, or might, adversely affect the rights of the holders of subsequent securities. I do not know where the line could be drawn, if the company could make this variation. I suppose that, if the date for redemption could be postponed on a re-issue, the debentures could be made perpetual debentures. I do not think that that is the intention of the section. In my view a power to " re-issue " debentures, even if the re-issue can be carried out in two alternative ways, is merely a power to revive the original transaction, and not a power to enter into a new and different transaction. Further, I think that this construction of the section is supported by sub-s. 5, dealing with the question of stamp duty. I think that there again the words "The re-issue of a debenture or the "issue of another debenture in its place under the power by "this section given to, or deemed to have been possessed by, "a company," refer either to the re-issue of the same piece of paper or to the issue of another piece of paper in its place; and the sub-section provides for the protection of any person who, in good faith, lends money on the security of a debenture which has been re-issued, but only once stamped, and which ought to have been stamped twice by reason of its having been re-issued.

For these short reasons I think that the debentures which are re-issued, or the debentures which are issued in their place, must contain the same provisions as to redemption as the original debentures which have been redeemed.

The declaration by the Court will be to this effect, that, on the true construction of s. 75 of the Companies Act, 1929, if the company redeems the second and third series, it can re-issue only the same debentures or other debentures having the same provisions in every respect, and the debentures so re-issued or the debentures issued in their place cannot bear a date for redemption different from the date for redemption of the debentures which have been redeemed.

One other question was argued before me, namely, whether the provisions of clause 9 of the trust deed of August 16, 1910, constitute a "provision to the contrary, whether express or "implied, in any contract entered into by the company," within the meaning of s. 75, sub-s. 1, para. (*a*). In view of the decision which I have already given, this question does not arise, and I do not propose to express any view upon it. The company will pay the costs as between solicitor and client.

Solicitors: *Slaughter & May*; *Coward, Chance & Co.*

K. R. A. H.

C. A.

1939

March 24, 27, 28.

In re BUCHANAN-WOLLASTON'S CONVEYANCE.

CURTIS *v.* BUCHANAN-WOLLASTON.

[1938. B. 1561.]

Covenant—Conveyance of land to joint tenants—Deed of covenant executed by joint tenants—Restrictions on user—Application by one of joint tenants to Court to order sale—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *ss.* 25, 30, 35, 36.

Where several persons take a conveyance of land as joint tenants and execute a deed of covenant, whereby they mutually undertake not to part with or deal with the land, except with the unanimous consent of all parties or by a majority vote, the Court will not aid one of the parties to break his contractual obligations by ordering, on his application, a sale of the land under ss. 35 and 36 of the Law of Property Act, 1925.

Decision of Farwell J. [1938] W. N. 375; [1939] 1 Ch. 217 affirmed.

APPEAL from the decision of Farwell J. (1)

By a conveyance, dated August 22, 1928, a piece of land at Lowestoft beside the sea was conveyed to Hugo John Buchanan-Wollaston, the first defendant, Frank Percy Curtis, the plaintiff, Constancia Rebecca Stephana Serjeant and Thomas William Seager Berry in fee simple as joint tenants. The purchase price of 550*l.* was provided by them in various proportions. The first defendant's residence adjoined the land purchased on the north-west. The plaintiff and C. R. S. Serjeant owned land and dwelling-houses to the north-west of the land purchased and separated from it only by a road. T. W. S. Berry owned land and a dwelling-house on the side more remote from the land purchased, but sufficiently close to be affected by its user.

On September 17, 1928, the purchasers entered into a deed of covenant, which recited that the land "was purchased by "them with the object of securing that it should not be used "in any manner which might be a nuisance or annoyance or "cause any detriment to or depreciation in value of their "said properties."

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(1) [1938] W. N. 375; [1939] 1 Ch. 217.

The deed proceeded: " Now each of the parties hereto in "consideration of the covenants and stipulations hereinafter "contained hereby mutually covenants and agrees with each "of the others of them as follows, that is to say: 1. No part "of the joint land shall be dealt with in any way which may "be or become a nuisance or annoyance or cause any detriment "to or depreciation in value of any of the above-mentioned "properties of the parties hereto respectively . . . . 4. No "building, structure or erection of any kind . . . . shall "except with the consent of each of the parties hereto, which "consent must be a unanimous consent, be at any time "erected on " [a defined area of the land]. " Any transaction "in connection with the parcel of land mentioned in this clause "must be unanimously agreed to by all the parties hereto."

Clause 5 provided that all profits arising out of the land should belong to the parties in certain proportions, corresponding to their contributions to the purchase price, and that outgoings should be borne by them in the same proportions.

Clause 6 provided: " Save so far as is otherwise expressly "provided by this deed all questions arising with reference to "the joint land shall be determined in such manner as may "be agreed between the parties hereto or as, failing such "agreement, shall be determined by vote . . . ." of the parties. By clause 7 provision was made for the transfer of the interests of the parties. Then clause 8 provided that, where the context admitted, any reference to the parties included a reference to their heirs, executors, administrators and assigns.

On August 16, 1930, C. R. S. Serjeant transferred all her share and interest in the land to the plaintiff. On June 16, 1932, T. W. S. Berry died. His executors, Violet S. Berry and Thomas G. S. Berry were the second and third defendants to this summons.

The plaintiff, having sold his house and property and removed from the neighbourhood, desired the joint land to be sold and the proceeds of sale divided. The first defendant refused to concur in selling the land, and he was supported by the second and third defendants.

On April 21, 1938, the plaintiff took out a summons by which he sought (1.) a declaration that by virtue of s. 36 of the Law of Property Act, 1925, the land vested in him and in the first defendant on the statutory trusts for sale imposed by s. 35 of the Act; (2.) a declaration pursuant to s. 84 of the Act (*a*) that the land was not now affected by any of the restrictions imposed by the deed of covenant or alternatively (*b*) what were the nature and extent of the restrictions (if any) thereby imposed? (3.) that pursuant to s. 30 of the Act the first defendant might be ordered to concur with the plaintiff in selling the land; (4.) that the statutory trusts in relation to the land might be executed by the Court.

Farwell J. dismissed the summons. The plaintiff appealed. The appeal was heard on March 24, 27, 28, 1939.

Roger Turnbull for the appellant. The conveyance of August 22, 1928, created a statutory trust for sale under ss. 35 and 36 of the Law of Property Act, 1925, subject to the power of postponement under s. 25. Then there came the deed of covenant. One of the questions that arise on that deed is whether the veto on the erection of buildings contained in clause 4 is to last for all time, thereby stultifying the trust for sale, or whether it is only for the lives of the parties. Clause 6 only deals with the property during the lives of the parties. Therefore, in the events which have happened, the contractual relationship no longer exists, and the veto and the restrictions have gone. The appellant is entitled to have the statutory trust for sale given effect to, for there is nothing in the conveyance and deed of covenant to prevent his doing so. If the conveyance stood alone, a clear duty to sell the property would be imposed under ss. 35 and 36. It is true that there is a power to postpone sale, but the duty to sell arises under the conveyance, unless all the interested parties are in favour of postponing it. It remains to consider the effects of the deed of covenant. There is nothing in clause 1 to make it inequitable to direct a sale at the request of the appellant. Clause 1 does not seek to prevent a sale, although it might give a right to impose restrictive covenants as to the use of the property. Similarly clause 4 does not operate to prevent a sale of the part of the property to which it applies. In any case these clauses were only intended to operate while all the parties to the deed were alive. "Parties" in these clauses mean the actual parties to the deed. Further, an attempt to omit the statutory trusts for sale, by any provision running counter to it, is inoperative: *In re Flint* (1); *In re Thomas.* (2) No restriction on a statutory trust for sale is possible as it is in the case of a trust for sale created by deed. The statutory trust for sale is peremptory. Farwell J. decided the case on the ground that the plaintiff had entered into obligations which made it inequitable for him to apply to have the statutory trust carried into execution against the wish of the persons interested. But the facts now before the Court show that he did not act unreasonably. He is not asking for a sale free of all restrictions, and, subject to proper restrictions, the interests of all parties will be protected.

Gerald Upjohn for the respondents. The appellant has elected to rest his case on the statute. Under s. 26, sub-s. 3, regard must be had to the wishes of all parties interested in exercising a trust for sale. Further, the deed of covenant here provides a mode for testing the views of the parties in regard to a sale, and until that machinery is exhausted the Court will not intervene. It follows that the Court will not cause the trust for sale to be performed at the request of one of several persons interested beneficially, when he has bound himself that the sale shall only take place as to part of the land on the unanimous agreement of those interested, and in regard to the remainder as the result of a vote. It cannot be right to assist the appellant by ordering a sale in such circumstances. The Court has a discretion in the matter, and in exercising that discretion should be guided by the wishes of a majority of those interested. Sect. 84 of the 1925 Act has nothing to do with this case. No one knows what restrictions there are; they can only be ascertained when the parties desire to sell.

(1) [1927] 1 Ch. 570.

(2) [1930] 1 Ch. 194.

C. A.

1939

BUCHANAN-WOLLASTON'S CONVEYANCE, *In re.*
CURTIS *v.* BUCHANAN-WOLLASTON.

Roger Turnbull in reply. There is nothing in either of these deeds to prevent the appellant applying under s. 84 to have the restrictive covenants discharged or modified.

SIR WILFRID GREENE M.R. In August, 1928, the respondent, Mr. Buchanan-Wollaston, the appellant, Mr. Curtis, a Miss Serjeant and the late Mr. Thomas William Seager Berry, who were all residents and owners of houses at Lowestoft, purchased by means of a sum put up by them in varying amounts a plot of land in the neighbourhood of their houses. That land was conveyed to them as joint tenants by a conveyance dated August 22, 1928. On September 17, 1928, they executed a deed which gives rise to the present controversy. The deed recites the acquisition of the piece of land, the proportions in which the purchasers subscribed the purchase money, their ownership of their houses in the vicinity of this land (which is called " the joint land ") and that the joint land was purchased by them with " the object of securing that it should "not be used in any manner which might be a nuisance or "annoyance or cause any detriment to or depreciation in "value of their said properties." Then comes a series of covenants introduced by these words : " Now each of the "parties hereto in consideration of the covenants and "stipulations hereinafter contained hereby mutually covenants "and agrees with each of the others of them as follows." Then clause 1 says : " No part of the joint land shall be dealt "with in any way which may be or become a nuisance or "annoyance or cause any detriment to or depreciation in "value of any of the before-mentioned properties of the "parties hereto respectively." That was the leading purpose of this document. Then there are a number of other clauses which do not affect the present question. Clause 4 provides that : " No building structure or erection of any kind," with an exception which is not material, " shall except with the "consent of each of the parties hereto which consent must be "a unanimous consent, be at any time erected on," a defined portion of the joint land which was identified by a line drawn upon the annexed plan. That line defined the northern part of the joint land. Then at the end of the clause is the following sentence: "Any transaction in connection with the "parcel of land mentioned in this clause"—that is the northern part—"must be unanimously agreed to by all the parties "hereto." Clause 5 provides for the distribution of the profits from any sale or lease or other dealing with the land among the parties in proportion to the amount that they had subscribed towards the purchase money, and a similar apportionment in respect of outgoings. Then clause 6 provides that: "Save so far as is otherwise expressly provided by "this deed"—and that would import the special provision with regard to the northern land in clause 4—"all questions "arising with reference to the joint land shall be determined "in such manner as may be agreed between the parties hereto "or as, failing such agreement, shall be determined by vote." Then it sets out what votes the parties are to have. Clause 4 requires, as I have said, unanimous agreement with regard to transactions affecting the northern land. Clause 6 in its application to the southern land enables any question relating to it to be determined by a majority vote. Clause 7 then provides for transfers or assignments of the rights or interests of the parties under the deed. It will be noticed that the rights or interests under the deed are not merely the contractual rights conferred on the parties by the various covenants entered into, but also include their interests in the profits and the proceeds of sale. I need not read that clause; it contains a provision giving the other parties, or the survivors or survivor of them, a right to have the offer first made to them. Miss Serjeant in the year 1930 by a deed endorsed upon this deed, assigned to the appellant her interest under this deed. A question has been raised as to whether or not that assignment is one of which the other parties, Mr. Buchanan-Wollaston and the executors of Mr. Seager Berry (who is now dead) can complain on some such ground, as I understand it, as that there was no offer to them. I do not quite know what the ground is; anyhow there is a ground of complaint, but it is agreed here, for the purposes of this appeal, that the present appellant must be treated as being the owner of the rights which that deed of transfer from Miss Serjeant purports to give him. That is without prejudice to such right, if any, as Mr. Buchanan-Wollaston and the executors of Mr. Seager Berry may have to attack that document in some other proceedings. Then clause 8 says: "In the construction of "this Deed where the context admits any reference to the "parties hereto includes a reference to heirs, executors "administrators and assigns of each of such parties respectively "and a reference to any of such parties includes a reference "to the heirs, executors administrators and assigns of such "party." As I have said, Miss Serjeant has sold her interest and she has left the neighbourhood. Her house is now owned by some person who is not affected by the present controversy. Mr. Buchanan-Wollaston still retains his house, for the benefit of which, with the others, this transaction was entered into. Mr. Curtis has left the neighbourhood and sold his house, and Mr. Seager Berry is dead, but I understand his executors are still the owners of his house. However that may be, the present position is that Mr. Buchanan-Wollaston, at any rate, is still the owner of his house, and claims to be entitled to enforce the provisions of this deed.

Mr. Curtis, on April 21, 1938, issued an originating summons, and the respondents to it were Mr. Buchanan-Wollaston and the executors of Mr. Seager Berry. The substantial relief that he asked for by that summons is that in clause 3: "That pursuant to section 30 of the Law of "Property Act, 1925, the first defendant may be ordered to "concur with the plaintiff in selling the said land." The basis of that application lies in the fact that, by reason of the conveyance to these four persons as joint tenants, the property was held as from the execution of the conveyance upon trust for sale. That is the effect of ss. 35 and 36 of the Law of Property Act, 1925. By s. 30 it is provided: "If "the trustees for sale refuse to sell or to exercise any of the "powers conferred by either of the last two sections, or any "requisite consent cannot be obtained, any person interested "may apply to the Court for a vesting or other order for "giving effect to the proposed transaction or for an order "directing the trustees for sale to give effect thereto, and "the Court may make such order as it thinks fit." Mr. Curtis, being anxious to have the land sold, by his summons is asking the Court to make an order for sale. In connection with that sale he also raises by the summons a question as to what restrictions, if any, affect the land, and the object really of that is to find out what upon a sale of the land are the restrictions that ought to be imposed upon a purchaser. Now Mr. Buchanan-Wollaston is apparently prepared to agree to a sale provided that restrictions which commend themselves to him are imposed upon the sale; but looking at the deed by itself the proper method of securing, according to the contract of the parties, the consent of Mr. Buchanan-Wollaston, and the consent of the executors of Mr. Seager Berry, if their consent be required—and as to that I shall have something to say presently—is to obtain with regard to the northern land the unanimous agreement of the parties, and with regard to the southern land a vote of the parties under clause 6 upon that question. Neither of those two things has been done. There has been no unanimous agreement, because Mr. Buchanan-Wollaston has not agreed to any proposed transaction; a sale, if proposed, must of course, be a sale on terms, and what those terms are to be is a matter for unanimous agreement. That is so far as the northern land is concerned. The same principle applies with regard to the southern land under clause 6, although the terms there are not so onerous because a majority vote is sufficient and unanimous agreement is not required. That being the object of the application, Farwell J. dismissed it, and he dismissed it on the ground that the appellant, Mr. Curtis, being a person who had contracted to the effect which I have mentioned, as to the way in which questions relating to this land should be dealt with, could not come to the Court and ask the Court to act in a way inconsistent with his own contractual obligations. The argument which Mr. Turnbull addressed to us on behalf of the appellant began with this proposition; this is logically the first argument which he puts forward. He says that, even if it be assumed that under this document, in the absence of unanimous agreement as to the northern land, and in the absence of a proper vote upon a definite question with regard to the southern land, those contractual restrictions are still in force, nevertheless they are overridden by the provisions of the Law of Property Act, 1925, which imposes upon the trustees the obligation of selling under the trust for sale, save in so far as the power of postponement under s. 25 is exercised by the unanimous consent of the trustees. He says that the Court has no option but to give effect to the statutory direction comprised in ss. 35 and 36. He then says that, of course, when the Court orders a sale it can only order a sale subject to restrictions which are to be binding upon the purchaser, and the actual form of those restrictions is a matter which the Court can determine, and one of the objects of the summons is to ascertain what form those restrictions ought to take. The argument ignores this, that a party to the deed who is asked to concur in a sale is not limited to submitting to a sale in which the only restrictions would be those in clause 1. He is in a very much stronger position because he is entitled to say: "You cannot sell this land without my agreement, and "I am not disposed to give my agreement unless I can get "something more suitable to my ideas." But however that may be, the whole basis of Mr. Turnbull's argument, in my opinion, falls away as soon as the true position is appreciated. The statutory trust for sale is one which must be exercised and was intended by the Legislature to be exercised subject to the power of the Court to enforce it. That appears in s. 30. But the Legislature must be taken to have known the principles upon which the court of equity proceeds when asked by one of a body of trustees, or other persons who are not in agreement, to lend its assistance for the purpose of carrying out a trust; the Legislature must be taken to have known the principles upon which those powers are exercised, and the power of the Court to enforce the trust for sale must be exercised in regard to the statutory trust for sale according to well-known and ordinary principles. I am not going to enter into a discussion of the question whether or not

C. A.
1939
BUCHANAN-WOLLASTON'S CONVEYANCE, *In re.*
CURTIS
v.
BUCHANAN-WOLLASTON.
Sir Wilfrid Greene M.R.

the provisions of the Act in creating this trust for sale have the effect of overriding or nullifying any provisions in the instrument which in some way clog or fetter the trust for sale. That is a question which came into the discussion in the case of *In re Flint* (1), before Astbury J. If and when that particular question comes to be considered again, it will require perhaps some full examination, but what I am saying now is not affected by the decision in that case, because it seems to me that the court of equity, when asked to enforce the trust for sale, whether one created by a settlement or a will or one created by the statute, must look into all the circumstances of the case and consider whether or not, at the particular moment and in the particular circumstances when the application is made to it, it is right and proper that such an order shall be made. In considering a question of that kind, in circumstances such as these, the Court is bound to look at the contract into which the parties have entered and to ask itself the question whether or not the person applying for execution of the trust for sale is a person whose voice should be allowed to prevail. In the present case, Farwell J. approached the matter from that angle and gave a perfectly definite and unhesitating answer to it, with which I entirely agree. He said in effect "Here is a person who has contracted "with others for a particular purpose, and the effect of the "contract is to impose upon the power of the trustees to sell "this land, certain restrictions." Without going into the question which I mentioned a moment ago as to overriding or not overriding those things, he said: "It is not right "that the court of equity should in those circumstances, on "the invitation of a person who has not acted in accordance "with the contract, and is opposed by other persons interested, "exercise the power of the Court and make an order for sale." That, of course, does not mean that in other circumstances, at some future time, the Court will not lend its aid. Circumstances may change. If all the parties died and all their houses were sold, I apprehend, for example, that the Court, if asked to enforce a statutory trust for sale, would not be

S 26 (3)

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(1) [1927] 1 Ch. 570.

disposed to listen to arguments against such a sale adduced by people who had no real interest in keeping this land unsold. Questions of that kind can be decided if and when they arise. In the present circumstances (and it is sufficient to confine my reasons to present circumstances) it seems to me that the appellant cannot ask the Court to help him in the way in which he desires. In saying what I have said I have assumed a particular construction of the sentence at the end of clause 4, and of the reference in clause 5 to the necessity of an agreement between the parties, or a majority vote for the purpose of determining questions relating to the southern land. It was said by Mr. Turnbull that he is not asking the Court to do something contrary to those provisions, because he says those provisions upon their true construction are no longer operative, his reason being that on their true construction they only apply during the joint lives of the four named parties. Of course, if that were the true construction, there would be substance in the argument, but, in my opinion that is not the true construction of those provisions. It seems to me that the reference there to "parties" imports the definition clause, clause 8, and includes not merely the parties but their heirs, executors, administrators and assigns. I see no difficulty in doing what clause 8 tells me to do—namely, to import that interpretation, and on that basis, in the present circumstances, the provisions in clauses 4 and 6, which I have been reading, remain on foot. It seems to me, therefore, that Farwell J. in the circumstances as they stood before him, and as they stand before us, was perfectly justified and perfectly right in taking the line that he did.

Now there is before us an application for leave to read certain further evidence. The nature of that evidence has been explained to us, and it is to this effect. Mr. Curtis is anxious to establish that there has been a determination by vote under clause 6 of the deed, the vote being a vote at a meeting which he and he alone attended, although the respondents were invited to come. That application, of course, would have been relevant only to a quite different case from that which has been put forward in the summons.

C. A.
1939
Buchanan-Wollaston's Conveyance, *In re.*
Curtis *v.* Buchanan-Wollaston.
Sir Wilfrid Greene M.R.

The summons is not based on the view, so far as the southern land is concerned, that the restriction imposed by clause 6, requiring agreement or a majority vote, has in fact been complied with, and that, therefore, there is some effective and concrete subject-matter with regard to which the Court can make an order. That is not the basis of the summons at all; the summons is not concerned with such a matter of fact, and whether or not such a determination has been come to is a pure question of fact, involving, of course, questions of law in regard to the construction of the clause itself. But no such case was made in the summons originally. If such a case had been made in the summons originally, there is no reason whatever why that evidence should not have been put before Farwell J. It seems to me that on two grounds that application to admit that evidence is an application which must be refused: the first ground is that it is not relevant to the only case that was made below and the only case that was raised by the summons, and the second ground is that in any event it is evidence that could quite easily have been and ought to have been put before the Court below if it had any relevance to the appellant's case. In those circumstances both the appeal and the motion for leave to adduce further evidence must be dismissed with costs.

Clauson L.J. I agree.

du Parcq L.J. I also agree.

Appeal dismissed.

Solicitors for appellant: *Grundy, Izod & Co., for Wiltshire, Sons & Jordan, Lowestoft.*

Solicitors for respondents: *George Thatcher & Son, for Sherwood & Co.*

P. J. B.

C. A.

1939

May 23.

In re MACLENNAN.

FEW *v.* BYRNE.

Income tax — Will—Deed of family arrangement — Construction— Annuities—Annuitants entitled to a clear yearly sum " after deduction of income tax "—Reliefs which annuitants might recover—Returnable to the estate—Finance Act, 1927 (17 & 18 *Geo.* 5, *c.* 10), *ss.* 39, 40—*General Rules to All Schedules, rr.* 19, 23, *sub-r.* 2.

By his will, dated January 3, 1917, the testator left annuities of 250*l.*, not free of income tax, to each of his children. He also left to his wife an annuity of 3000*l.*, not free of income tax, and the income from the residue of his estate. He died in January, 1918, leaving him surviving his wife and two children, a son and a daughter.

On October 16, 1930, a deed of family arrangement, pursuant to an order of the Chancery Division of October 1, 1930, was entered into. Under that deed the testator's widow covenanted to pay their daughter such an annual sum as, together with the amount of the annuity of 250*l.*, would, after deduction of income tax but not sur-tax, leave in her hands the sum of 500*l.*, clear of all deductions for income tax, but not sur-tax. There was a similar covenant for the benefit of the son :—

Held, that on the true construction of the will and the deed the annuitants were entitled to have left in their hands the clear yearly sum of 500*l.*, and that the reliefs to which they might become entitled should be returned to the trustees in accordance with the rules laid down in *In re Pettit* [1922] 2 Ch. 765.

In re Pettit. Le Fevre v. *Pettit* [1922] 2 Ch. 765 followed.

In re Jones. Jones v. *Jones* [1933] Ch. 842 distinguished.

Decision of Bennett J. affirmed.

APPEAL from Bennett J.

By his will, dated January 3, 1917, the testator left annuities of 250*l.*, not free of income tax, to each of his children. He also left to his wife an annuity of 3000*l.*, not free of income tax, and the income from the residue of his estate. The testator died in January, 1918, leaving him surviving his wife, the defendant, now Lady Byrne, and two children, the defendants Mrs. Boyd and Donald J. H. Maclennan.

On October 16, 1930, a deed of family arrangement, pursuant to an order of the Chancery Division of October 1, 1930, was entered into. Under that deed Lady Byrne covenanted to pay Mrs. Boyd " such an annual sum as together "with the amount of the annuity of 250*l.* payable to or for "the benefit of Mrs. Boyd under the will of the testator would "(if such annual sum and annuity respectively were payable "to Mrs. Boyd absolutely) after deduction of income tax but "not sur-tax leave in her hands the sum of 500*l.* clear of all "deductions for income tax but not sur-tax." There was a similar covenant for the benefit of Donald Maclennan. A question arose whether the two annuitants were entitled to retain the reliefs which, under the Income Tax Acts, they might receive in respect of their annuities or whether they should return any such sums so recovered to the trustees of the estate. The trustees of the will and deed took out this summons asking for the determination (inter alia) of that question.

Bennett J. held that the annuitants should return the sums so recovered to the trustees. The annuitants, Mrs. Boyd and Donald Maclennan appealed. The appeal was heard on May 23, 1939.

Raymond Needham K.C. and *H. O. Danckwerts* for the appellants. The annuitants are entitled to retain any reliefs which they may receive. The statutory conditions are material in considering this question. Rules 19 and 21 of the General Rules to All Schedules (see the Finance Act, 1918) should be read in conjunction and they should both be read in connection with s. 39 of the Finance Act, 1927. Sect. 17 and the five following sections of the Income Tax Act, 1920 (10 & 11 Geo. 5, c. 18), set out the grounds on which an income tax payer is entitled to deductions. "After deduction of income tax" must mean that the trustees have to pay the full amount after income tax has been deducted. In *In re Pettit* (1), Romer J. had the words "free of tax" to construe. Bennett J. treated this case as if the words were "free of tax." In fact *In re Jones* (2) is much more applicable to this case than is *In re Pettit* (1). "Current rate" and "standard rate" mean the same thing. Here there is a perfectly normal direction, and it is a matter of construction of the particular

(1) [1922] 2 Ch. 765.

(2) [1933] Ch. 842.

words in this particular deed. The use of the word "sur-tax" does not change deduction into something else.

A. H. Droop for the trustees.

R. F. Roxburgh K.C. and *B. G. Burnett-Hall* for Lady Byrne. It is a question of construction. In *In re Williams* (1), it was held that "without deduction of income tax" had the same meaning as "free of income tax." Therefore *In re Pettit* (2) ought to apply. What is meant here is that the annuitants should receive the full annuities after all adjustments have been made. If they are allowed to retain the reliefs, they will get more than their full annuities.

E. B. Stamp for other respondents.

Raymond Needham K.C. replied.

SIR WILFRID GREENE M.R. The question raised by this appeal is a question of construction arising under a deed dated October 16, 1930. Its decision necessarily depends, as so often happens in cases of this kind, upon rather fine distinctions of language, but that is inevitable because in construing documents each word used by the settlor, or the testator, as the case may be, must be given its true and proper meaning in the context, and it is not legitimate for the purpose of construction to treat phrases used in the document as though they had been differently expressed; accordingly what we have to do is to examine the precise language of this document and place upon it the proper construction in relation to the particular subject-matter with which it deals.

Under the will of the late Mr. Donald Maclennan, whom I will call the testator, his children, the appellants, Mrs. Boyd and her brother were entitled to an annuity of 250*l.* each. These annuities were not given free of income tax, and accordingly the trustees of the will on paying them would on ordinary principles pay them less tax, which they would deduct. Under the same will the testator's widow, now Lady Byrne, was entitled to an annuity of 3000*l.*, and was also entitled for her life to the residue of the income of the testator's estate.

The deed of October 16, 1930, was entered into by way of family arrangement, pursuant to an order of the Chancery Division of October 1, 1930. I need not refer at any length to the deed; it is sufficient if I read the covenant in the case of one of the annuitants, Mrs. Boyd, and on which the present question arises; the covenant in respect of the other annuitant Mr. Maclennan, is to the same effect. Under the deed Lady Byrne charges the residue or balance of the annual income of the testator's residuary estate, after providing for the annuities bequeathed by his will, including her own, with the payment by the will trustees in priority to all other payments thereout and as a first charge thereon of the following sums to rank pari passu for the benefit of Mrs. Boyd and Mr. Maclennan, that is to say, the provision with regard to Mrs. Boyd is this: "First such an annual sum as together with the amount of the "annuity of 250*l.* payable to or for the benefit of Mrs. Boyd "under the will of the testator would (if such annual sum and "annuity respectively were payable to Mrs. Boyd absolutely) "after deduction of income tax but not sur-tax leave in her "hands the sum of 500*l.* clear of all deductions for income tax "but not sur-tax." The substance of the controversy which now arises between those two annuitants and Lady Byrne, who is entitled to the rest of the income, is as follows: It is said on behalf of the annuitants that in ascertaining the sum which they are entitled to receive under this deed no account is to be taken of the circumstance that, under the provisions of the Income Tax Acts, they are entitled to certain reliefs, in other words, that, when they come to claim those reliefs and the repayment of tax to which they are entitled in respect thereof, they are entitled to keep for their own use any sums so recovered from the Inland Revenue. On behalf of Lady Byrne it is said that any sums so recovered must go back to the trustees in order to prevent the annuitants receiving more than what it is said they were entitled to receive, namely, an ultimate clear sum of 500*l.* after all income tax liability as between them and the revenue had been cleared up and settled.

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(1) [1936] Ch. 509.

(2) [1922] 2 Ch. 765.

Bennett J. answered the question in favour of Lady Byrne, and, in my opinion, the answer that he gave was the correct

C. A.
1939
MACLENNAN, *In re.*
FEW
v.
BYRNE.

Sir Wilfrid Greene M.R.

one. The question, as I have said, is a question of construction of a few words in this deed, but before I come to examine those words it is necessary to make a few observations as to the relevant subject-matter with which those words are concerned in so far as it is to be found in the provisions of the Income Tax Acts.

At the date when the deed was executed the Finance Act of 1927 was in force. That Act, as is well known, introduced certain new principles into income tax law. For the present purposes only two matters need be mentioned. The first is that the sum which the payer of an annual sum out of income brought into charge is entitled to deduct from the annual payments which he makes is thenceforward to be a sum equal to income tax at the standard rate which was first introduced by the Act of 1927. That then since 1927 is the right of the payer of such an annual sum, namely, to make a deduction at the standard rate.

The other matter which it is perhaps important to have in mind, although it may be that the change is not for a purpose such as the present really one of substance, is that the relief which persons entitled to relief under the Acts may claim is to be provided for them not as previously was the case, by means of deduction from assessable income, but by means of relief from income tax by way of a deduction from the amount of income tax with which the individual is chargeable. The position therefore is that although the payer of an annual sum to which r. 19 of the General Rules to All Schedules applies is prima facie entitled to make the deduction at the standard rate, the amount so deducted (which, of course, is deducted in respect of the recipient's tax) is not the amount which the recipient has to pay for tax, because he is entitled under the provisions of the Act of 1927, s. 40, to have his income tax liability brought to its proper figure by finding out what deduction from the tax to which he is liable should be made in respect of the relief to which he is entitled. The ultimate settlement therefore of the income tax liability of a payee under a covenant to pay an annual sum is only reached when the reliefs have been allowed and the amount quantified and the ultimate settlement of the amount of tax to which he is in law liable has been ascertained.

One more matter must be borne in mind in approaching the words in question, which is, of course, a truism, but it is well to state it, that in the matter of sur-tax there is no question, and never can be a question, under the present system of any deduction being made by the person making an annual payment. Sur-tax is a matter which rests entirely between the taxpayer and the revenue. I have not thought it necessary to read r. 19 of the All Schedules Rules. All that I need say about it is that the words which are used therein to describe the permitted action of the payer are the words "deduct and "retain thereout," that is to say, out of the gross sum which falls to be paid.

Bearing those considerations in mind, I turn to consider the actual language of this document. In the simple case of a covenant to pay an annuity with nothing more, the payer is not concerned with the tax liability of the recipient save in the sense that he is entitled to deduct in making the payment tax at the standard rate, and the recipient is then at liberty to claim relief from the revenue and keep whatever sum he may recover. But the language of any particular provision may alter that state of affairs. In order to avoid the difficulty and inconveniences caused by the provision in r. 23, sub-r. 2, which prohibits agreements for payment of annual payments in full without allowing deductions, the well known device has been used in the case of documents inter vivos of providing for payment of such a sum as after deduction of income tax at the standard rate will leave a clear sum of a stated amount. Such a covenant is in truth nothing more nor less than a covenant to pay a gross sum; it is only a covenant to pay a gross sum that is permissible in view of r. 23, sub-r. 2. The only difference between such a case and the case of a covenant to pay a named sum is that the gross sum can only be ascertained by taking into account the factor stated; it is really a covenant to pay X*l.* and the value of X has to be ascertained by taking the net figure which is mentioned in the covenant and applying the standard rate of tax at the relevant time, and by that method the actual gross sum is ascertained. In such a case where the language used is what I have described, the directions given for the purpose of ascertaining what that gross sum is to be is to make quite clear what are the factors to be taken into account in arriving at it ; and the tax factor which is to be taken into account in such a case is the standard rate of tax and nothing else. But it is clear that a covenantor if he is so minded may go a step further and by appropriate language may provide that the sum of X*l.* shall be arrived at by taking into account not merely the factor of the standard rate of income tax but that factor adjusted by bringing into account also any recoveries which the payee, as a person entitled to relief, may be able to claim. If language of that character has been used effect must be given to it. The real question in the present case is whether or not in arriving at the figure of a gross sum of X*l.* which this document is contemplating, the reliefs to which the payee is entitled are to be brought in as a figure in ascertaining the amount of X.

With those preliminary observations, what I have to say on the actual language used can be said quite shortly. It is perfectly true that the word "deduction" taken by itself would appear to point to the act of deduction as the only relevant matter to be taken into account, and if that were the true view the result would be that the only tax factor which would come into calculation would be the factor of standard rate of tax, but I find it quite impossible to give to the word "deduction" that limited meaning. First of all, the phrase used is "after deduction of income tax" (I may say in passing it does not say "income tax at the standard rate") "but not sur-tax." It is clear, therefore, from those words that the parties to this document are contemplating an annual sum in respect of which, but for the provisions made, it would be possible to say that it is liable to be diminished by reason of the income tax and sur-tax liability of the recipient, and the language shows that of those two possible methods of diminution the only one to which regard is to be paid is that relating to income tax. The phrase "deduction of income tax but not sur-tax" is repeated in a different form at the conclusion of the paragraph, because the sum of 500*l.* is to be a sum clear of all deductions for income tax but not sur-tax. That language again appears to me to show that, in deciding whether the annuitant has received what is due to her under the deed, her liability to income tax is to be regarded, but not her liability in respect of sur-tax. The only way in which her income can be said to be subject to be liable to deduction in respect of sur-tax is by reading the word "deduction," not as Mr. Needham would have us read it, as an echo of the word which appears in r. 19, but as referring to the diminution of the recipient's income to which she is liable by reason of these taxes.

A further matter which appears to me to confirm what I have said is the use of the phrase "leave in her hands." That, coupled with the following words "clear of all deductions for income tax but not sur-tax," seems to me to contemplate the final result of the transaction and to be speaking of the sum which is left in her hands and which she can use after all income tax, but not all sur-tax, claims, which may arise in connection with it, have been satisfied. The phrase "leave in her hands" seems to me to point to a final result. There can be no question that, if the contention of the annuitants is right, the sum that will be left in their hands after the income tax questions have been decided and finally settled and adjusted will be in excess of the stated 500*l.*, because they will have received 500*l.* clear from the trustees and they will then have recovered from the revenue that part of the tax already paid by the trustees in respect of their annuities, which in the result turns out to be an over-payment. As I have already pointed out, if a payer of income tax has suffered tax by deduction and is entitled to relief, it means that he has borne more tax than he is liable to pay. If by the machinery of the Income Tax Act the revenue gets a flat rate of tax by deduction, it does not alter the circumstance that when it does so as between itself and the payee it is getting more than it is entitled to. But that is mere machinery and the adjustment is made and

C. A.
1939
MACLENNAN, *In re.*
FEW
v.
BYRNE.
Sir Wilfrid Greene M.R.

the tax brought back to its proper level by means of claims to relief and consequential repayment. Taking the language of this will and giving, as I have endeavoured to give, full effect to every word which the parties have used, I have come quite clearly to the opinion that the construction adopted by the learned judge was the right one.

I cannot conclude without making reference to two authorities which have a bearing on this matter. The first one is a decision of Romer J., as he then was, in *In re Pettit.* (1) That was a case of an annuity given under a will free of income tax and the question arose whether the relief to which the annuitant was entitled enured for the benefit of the trustees or whether she was entitled to keep the proceeds of it herself. With regard to the nature of the claim to relief, the learned judge stated the effect of the right to relief at that date (this was before the Act of 1927) to be that the annuitant was not liable in respect of her income to the full rate of income tax. In substance therefore he was treating the provisions which then existed as to reliefs as being to the same effect, at any rate for his purposes, as those which at present exist under the Act of 1927. But the reasoning by which the learned judge arrived at the conclusion he did—namely, that the annuitant was bound to account for the sum recovered to the estate, was reasoning which, in my judgment, applies equally in the present case. He treats the direction in the will as a direction to the trustees to ascertain what is the gross sum which will give the net annuity specified, a clear sum of 1000*l.* He points out that in calculating that gross sum it would lead to an inaccurate result if the trustees merely calculated it by reference to the deduction which it was permissible for them to make without reference to the recoveries which the annuitant might obtain. He says that the true calculation which the trustees ought to make is to ascertain a sum which, after taking not merely the initial deduction but also the matter of the relief into account, will produce the net sum specified. If I may say so with respect, that reasoning appears to me to be as satisfying as any reasoning can be. The case, of course, was the case of a will, and the phrase used was " free of income tax." In the case of a deed the result desired cannot be obtained by phraseology such as that by reason of r. 23, and it is for that reason, as I have already said, that when it is desired to produce a similar result in the case of a deed the formula which must be adopted is the formula which gives you the sum which I have described as X. The interesting thing about Romer J.'s decision is that in analysing the language of that will he treats it as though it was an instruction to arrive at a sum X by means of a formula of that character, and that is the meaning which he attributes to the words " free of income tax " in a will.

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(1) [1922] 2 Ch. 765.

The other case was a decision of Eve J. in *In re Jones* (1), in which that learned judge, on the language of the particular will before him, distinguished *In re Pettit* (2) and came to the appropriate conclusion on that basis. The language of the will there was " to pay such an annuity as after deducting "therefrom income tax at the current rate for the time being "would amount to a clear yearly sum of 350*l.*" The learned judge distinguished *In re Pettit.* (2) He first of all construed the words " at the current rate " as meaning the standard rate, that being the appropriate phrase under the Act of 1927, and, having so construed those words, he pointed out that the formula for arriving at the relevant gross sum—and here I am not using his language but expressing what I think is the basis of his decision—was one in which the only tax factor to be taken into account was the actual figure of deduction at the current rate and that it was not legitimate to import the further factor of recoveries in respect of relief. There again, if I may say so, it does not seem to me that, on the language which the learned judge had before him in that case, any other conclusion was possible. The use of the phrase " deducting income tax at the current rate " can in that context only have referred to the act of deduction which under r. 19 of the All Schedules Rules, as amended by s. 39

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(1) [1933] Ch. 842.

(2) [1922] 2 Ch. 765.

C. A.
1939
MACLENNAN, *In re.*
FEW *v.* BYRNE.

of the Finance Act, 1927, is contemplated. That was the only thing that had to be regarded in that case.

I am unable to take the view presented to us by Mr. Needham and Mr. Danckwerts that the case is one which resembles *In re Jones* (1) and does not resemble *In re Pettit.* (2) In my opinion the conclusion of the learned judge was perfectly right, and the appeal must be dismissed.

FINLAY L.J. I agree.

LUXMOORE L.J. I also agree.

Appeal dismissed.

Solicitors: *J. E. Lickfold & Sons; E. B. V. Christian & Co.; Few & Co.; Warren & Warren.*

P. J. B.

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(1) [1933] Ch. 842.

(2) [1922] 2 Ch. 765.

In re BEALE (R. G. F.).

Ex parte THE BOARD OF TRADE.

FARWELL J.

1939

May 15.

Bankruptcy—Trustee elected by creditors—Accountant—Member of firm who had acted for debtor—Sums received and payments made on his behalf—Proof of debt for professional services—Objection of Board of Trade to appointment—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 19.

A receiving order having been made on his own petition against a debtor, who had not previously committed an act of bankruptcy, the creditors elected as trustee in bankruptcy an accountant whose firm had acted for him for several years, receiving money and making payments on his behalf. The firm had submitted a proof of debt in the bankruptcy for a sum of 112*l.* 11*s.* for professional services rendered to the debtor and a cash account of receipts amounting to 415*l.* 5*s.* 5*d.* and disbursements amounting to 415*l.* 14*s.*, including two items for their fees. The Board of Trade, without attacking the character of the accountant, objected to his appointment under s. 19, sub-s. 2, of the Bankruptcy Act, 1914 (1), and notified their objection to the High Court under s. 19, sub-s. 3:—

Held, (1.) that the Court had to determine, not whether in all the circumstances it would be best to permit the proposed trustee to act or whether he would in fact act impartially, but whether he was a person whose relation to the bankrupt or his estate would make it difficult for him to act with impartiality; (2.) that, the proposed trustee being an accounting party who, if the account for services rendered were not allowed in full, might have to make payments to the estate, the Board of Trade had satisfied the Court that there were proper grounds for the objection.

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(1) By s. 19 of the Bankruptcy Act, 1914: "(1.) Where a debtor "is adjudged bankrupt . . . . the "creditors may by ordinary re"solution appoint some fit person, "whether a creditor or not, to fill "the office of trustee of the pro"perty of the bankrupt; . . . .

"(2.) The person so appointed "shall give security in manner "prescribed to the satisfaction of "the Board of Trade, and "the Board, if satisfied with "the security, shall certify that "his appointment has been duly "made, unless they object to the "appointment on the ground "that . . . . his connexion with "or relation to the bankrupt or "his estate or any particular "creditor makes it difficult for "him to act with impartiality in "the interests of the creditors "generally.

"(3.) Provided that, where the "Board make any such objection "they shall, if so requested by a "majority in value of the credi"tors, notify the objection to the "High Court, and thereupon the "High Court may decide on its "validity."

FARWELL J.

1939

BEALE (R. G. F.), *In re*. THE BOARD OF TRADE, *Ex parte*.

NOTIFICATION pursuant to s. 19, sub-s. 3, of the Bankruptcy Act, 1914.

On December 30, 1938, Richard George Forfeitt Beale (hereinafter called "the debtor") presented a bankruptcy petition against himself in the Barnstaple County Court. A receiving order was made against him, and he was adjudged bankrupt. There had been no previous act of bankruptcy. On January 16, 1939, the first meeting of creditors in the bankruptcy was held, and at that meeting it was resolved that George Murray Symons, an accountant and a member of the firm of Charles Henry Symons (hereinafter called "the firm"), should be appointed the trustee in bankruptcy. This firm had acted for many years as accountants for the debtor, and during the period from January 27, 1938, to December 16, 1938, they had received various sums of money from him and on his behalf, and had made several payments on his behalf. They submitted to the Official Receiver a cash account covering that period, setting out receipts amounting to 415*l*. 5*s*. 5*d*. and disbursements amounting to 415*l*. 14*s*. Included in the disbursements were two items, described as "Messrs. Symons on account of fees." These were 10*l*. on April 11, 1938, and 13*l*. 13*s*. on April 30, 1938. The firm also submitted a proof of debt in bankruptcy for a sum of 112*l*. 11*s*. for professional services rendered by them to the debtor between April 29, 1937, and December 6, 1938. The consideration for this sum was stated to be "professional "services rendered between the opposite dates and as according "to detailed account already enclosed to the debtor." This account set out the various services alleged to have been rendered to the debtor by the firm, but set no charge against each, and concluded with a claim for a lump sum of 131*l*. 5*s*. It did not appear how this sum was reduced to 112*l*. 11*s*.

The Board of Trade having on March 6, 1939, objected to the appointment of George Murray Symons as trustee in bankruptcy, on the ground that his connection with or relation to the bankrupt or his estate made it difficult for him to act with impartiality in the interests of the creditors generally, they were requested by a statutory majority of the creditors to notify their objection to the High Court. In accordance with this requisition they notified it accordingly.

V. R. Aronson for the Board of Trade. An accountant in such a position as the proposed trustee should not be appointed: *In re Stovold.* (1) All the Court has to do is to decide whether circumstances have arisen which would justify the objection that the proposed trustee would find it hard to act impartially. The Court has not to decide whether in the circumstances it would be best to let him act: *In re Lamb* (2); *In re Mardon.* (3) This case falls clearly within the principles laid down in those authorities. The proposed trustee would have to decide judicially on debts owing to his firm. The Board of Trade is right in taking the objection that he would find it difficult to act impartially. It is not in point to say that if he goes wrong the Board of Trade can put him right.

The proposed trustee, George Murray Symons, in person. The position contemplated in s. 19, sub-s. 2, is that of a proposed trustee who has had complete control of the debtor's finances. In the present case the relationship was only that of an accountant acting for his client. There were no transactions which would prevent me from acting with impartiality. The only difficulty arises in connection with my own account and that is not sufficient to bring s. 19, sub-s. 2, into operation.

FARWELL J. [having stated the facts:] As I understand the authorities to which I have been referred, it is not for this Court, on such an application as this, to determine whether or not in all the circumstances it would be best to permit the trustee, whom the majority of the creditors desire, to act. That is not a matter into which I have to inquire; nor am I in any way concerned with the merits on the one side or the other. As I understand the decision of the Court of Appeal in the case of *In re Lamb* (4) I have merely to

(1) (1889) 6 Morrell, 7, 15.
(2) [1894] 2 Q. B. 805, 814, 819.
(3) [1896) 1 Q. B. 140.
(4) [1894] 2 Q. B. 805.

FARWELL J.

1939

BEALE (R. G. F.), *In re.* THE BOARD OF TRADE, *Ex parte.*

adjudicate upon the objection taken by the Board of Trade that the proposed trustee is a person whose "connexion "with or relation to the bankrupt or his estate or any particular "creditor makes it difficult for him to act with impartiality "in the interests of the creditors generally." If I come to the conclusion that the Board of Trade have satisfied me that that is the position, then I have no discretion in the matter; I cannot consider whether in all the circumstances, it would, notwithstanding that fact, be desirable that the trustee should be confirmed in his appointment. I have merely to hold, in that case, that the Board of Trade were justified in their objection and to uphold that objection.

In the present case I desire to say at once that there is no sort of reflection on the gentleman who has been elected trustee by the creditors. Mr. Aronson, very properly, on behalf of the Board of Trade, has said that he has nothing whatever to suggest against this gentleman's integrity or honesty. I have no material to form any opinion at all as to the gentleman's character, and I am perfectly willing to accept what the Board of Trade, through their counsel, have said and I desire to emphasize that nothing I am going to decide will cast any reflection on him. But the position is this. The proposed trustee or his firm have charged in the cash account which was sent in to the bankrupt two sums of 10*l.* and 13*l.* 13*s.* As trustee it would be his duty to investigate those two charges and see whether they were proper having regard to the work that was done. Then (and this is in my view a more serious matter) it would be his duty to investigate the proof which has been put in for services rendered by him or by his firm. It is impossible to say that a trustee who is an accountant and has made charges for professional services which are not itemized but are included in one lump sum, is not a person who is put in a position where it may be difficult for him to act with impartiality. It may be that, if he were permitted to continue as trustee, he would in fact be quite impartial. That is not what I have to decide. I have to determine whether it would be difficult for him to act with impartiality. In my judgment, when you have a person who is in a position,

FARWELL J.

1939

BEALE (R. G. F.), *In re.* THE BOARD OF TRADE, *Ex parte.*

vis-a-vis the other creditors and the bankrupt, of being an accounting party and who may, if his account for services rendered is not allowed in full, have to make payments to the bankrupt's estate, it is quite impossible to say that that is not a case where the Board of Trade have proper grounds, having regard to the terms of the section of the Act, for taking the objection. Once I come to that conclusion then, on the authorities, the only course open to me is to say that the objection must be sustained.

Solicitor : *Solicitor to the Board of Trade.*

F. H. C.

FARWELL J.

1939
May 16, 17, 18.

REGIER *v.* CAMPBELL-STUART.

[1938. R. 1768.]

Principal and agent—Agent required to find house—Purchase by agent of suitable house in name of his own nominee—Purported resale to himself at higher price—Principal told that agent had bought house for himself at that price—Resale to principal at yet higher price—Whether agency terminated.

The defendant having agreed as agent for the plaintiff to give her particulars of any house suitable for purchase by her of which he might hear, bought a house for 2000*l.* through a nominee, who never had any interest in it, and subsequently entered into a purported contract to purchase it from him for 4500*l.* He then resold it to the plaintiff for 5000*l.*, concealing from her the nature of the previous transactions, and representing that he had paid 4500*l.* for it:—

Held, (1.) that, though an agent might terminate the relationship of principal and agent by selling to his principal property which belonged to himself, it was his duty to act honestly and faithfully, and, if he concealed material facts, obtaining an unfair advantage by fraud, the relationship was not terminated by such a contract;

(2.) that, accordingly, the defendant, having concealed the true nature of the transaction from the plaintiff by fraud, had acted in breach of his duty as agent and was liable to account to the plaintiff for all profits obtained by him without her knowledge and consent in his capacity as agent for her.

WITNESS ACTION.

In December, 1937, and January, 1938, Georges Yablonsky (hereinafter called "the son"), as agent for his mother, the plaintiff, Olga Regier, a Russian by birth, resident in Switzerland, requested the defendant, Kenneth Campbell-Stuart, whose acquaintance he had made on a social occasion and who had experience as a dealer in real property, to find her a house in London for purchase, suitable for conversion into flats, in one of which the son and his wife could live. The defendant agreed, and from time to time sent particulars of houses. In January, 1938, he obtained particulars of a suitable leasehold house in Bayswater known as "The Red House." The particulars stated that the price was 4250*l.*, but the vendors, who had been trying to sell it for several months, were willing to accept 2000*l.*, and on January 10, 1938, entered into a contract of sale with the defendant's brother-in-law, one Harold Brown, who was the nominee of the defendant, and never had any interest in the house. The purchase-money was wholly provided by the defendant. On February 16, 1938, the defendant entered into a purported contract of sale with Harold Brown for the purchase by the defendant of the lease at the price of 4500*l.*

About January 17, 1938, the defendant had informed the son that he had purchased this house for himself and his wife, inviting him to come and see it. Consequently, the plaintiff, her son and his wife, visited the house and, considering it completely suitable to her requirements and those of her son, the plaintiff expressed herself as anxious to purchase it. The defendant represented that he had acquired it for 4500*l.*, and after some negotiation he agreed to sell it to the plaintiff for 5000*l.*, saying that this would allow him a profit of 500*l.* Accordingly, by a contract entered into on February 24, 1938, the plaintiff agreed to buy and the defendant agreed to sell the lease for 5000*l.*

On September 1, 1938, the plaintiff having been apprised of the previous transactions and dealings with the property, brought this action against the defendant for damages for fraudulent misrepresentation and for an account of all profits obtained by the defendant without her knowledge or consent in his capacity as her agent.

E. Holroyd Pearce for the defendant. The defendant cannot be held accountable as an agent: *Arkwright* v. *Newbold* (1); *Gluckstein* v. *Barnes.* (2) The scope of the defendant's agency was limited to informing the plaintiff about suitable houses. He was not an agent for the purpose of making any contract. Before the plaintiff and the defendant entered into the contract for resale, she was informed by him that the property belonged to him and that he himself was the vendor. That was sufficient to determine the relationship of principal and agent.

(1) (1881) 17 Ch. D. 301.

(2) [1900] A. C. 240.

Norman Daynes K.C. and *Hon. Denys Buckley* for the plaintiff. The instructions by the principal to the agent were to find houses of a particular kind. The duty of the agent was to put particulars of the house before the client. The true nature of the transactions was fraudulently concealed from the principal by the agent, who thus induced her to buy the property in the belief that he had paid 4500*l.* This was a breach of his duty as agent to act faithfully and honestly towards his principal, and the agency was not determined. [They referred to *Kimber* v. *Barber* (1) and *Lees* v. *Nuttall.* (2)]

FARWELL J. [having stated the facts :] It has been argued by counsel for the defendant, who has conducted this case on behalf of his client with moderation and ability, that the fact that the defendant told the plaintiff, before she entered into the contract, that he himself was the vendor of the property, was sufficient to determine his agency for her. I cannot doubt that at any rate up to that time there did exist the relationship of principal and agent between the plaintiff and the defendant. No doubt the scope of that agency was limited. What the defendant had undertaken to do for the son of the plaintiff, who was acting on her behalf throughout, was to provide particulars of any houses of which he should hear and think suitable for the purpose which the plaintiff had in mind and which she had communicated to him. He was an agent to that extent. Of course, he was not an agent for the purpose of signing any contract of the plaintiff's or doing more than assisting in the way I have mentioned, but that there was the relationship of principal and agent to that limited extent I think is quite plain.

When the relationship of principal and agent exists, the agent may terminate that relationship by himself selling to his principal property which belongs to him so long as the principal knows that the property does in fact belong to the agent and that the agent is intending to sell his own property.

(1) (1872) L. R. 8 Ch. 56.
(2) (1829) 1 Russ. & M. 53; (1834) 2 My. & K. 819.

But that must, in my judgment, be limited to this extent, that it is the duty of every agent to act honestly and faithfully towards his principal, and, if he conceals most material facts from his principal and by means of a fraud obtains an advantage for himself by purporting to sell or by selling property which is his own, then the duty which lies upon him is not put an end to by such a contract, and he remains liable to account for any secret profit which he has made as the result of the transactions between himself and the principal.

In the present case I am satisfied that the whole of this transaction between the plaintiff and the defendant and Harold Brown was in fact a contrivance for the purpose of enabling the defendant to obtain a handsome profit as the result of his dealing with the house and in the hope, I think the very lively hope, that the profit would be obtained from the plaintiff who had, through her son, conveyed to him information as to the nature of the house which she desired to buy, which knowledge the defendant was making use of for that purpose.

The position, it seems to me, was this. The defendant, if he had acted quite strictly, ought to have passed on the information as to The Red House directly to the plaintiff through her son and given her an opportunity of buying the house from the original vendors, but I do not think that the relationship of principal and agent between the parties necessarily precluded the defendant from entering into a contract to buy the house himself. If, however, he was proposing to resell it to the plaintiff, he was bound to give the plaintiff the fullest possible information both as to the true price which he had paid to the vendors for it and the amount which he asked, showing the profit, if any, which he required as the result of the resale. If the plaintiff, knowing all those facts, and fully acquainted with the true position, had chosen then to enter into a contract to buy the property from the defendant, even at a profit to him, the defendant would not have done anything for which he could be held legally liable. But, in my judgment, the moment the true transaction by which the defendant acquired this property was concealed from the plaintiff (deliberately concealed by means of a fraud), and the plaintiff was induced to buy the property by reason of that fraud in the belief that the defendant had paid 4500*l.* for the property, the defendant was doing that which was in direct breach of his duty as agent. He cannot escape from the liability which results therefrom merely by saying: "At "the time when I contracted to sell the property to the plaintiff "I myself was the owner of it and the plaintiff was aware of "that situation, because I told her." If that were permissible and if an agent could escape from his liability by a trick of that sort, then it would leave the door open for many gross frauds, and it would be, in my view, directly contrary to the principle which is perfectly well established, of the necessity for an agent to act honestly and faithfully towards his principal.

In those circumstances it follows that the plaintiff is entitled to the relief which she seeks. I do not think that it is necessary in this rather unhappy and sordid story to travel through it at any greater length. The facts as I find them in this case are in a very small compass and, in my judgment, lead to the only possible result, that the plaintiff is entitled to recover from the defendant whatever profit the defendant made as a result of the dealings which he had in connection with this lease between himself and the plaintiff. I propose to direct that an account be taken of all profit obtained by the defendant without the plaintiff's knowledge or consent in his capacity as agent for the plaintiff. The defendant must pay the costs of the action.

Solicitors: *Evill & Coleman; Glover, Scott & Apthorpe-Webb.*

F. H. C.

COMPTON *v.* COUNCIL OF THE COUNTY BOROUGH OF WEST HAM.

[1937. C. No. 734.]

CROSSMAN J.

1939
May 10, 11, 12.

Public authority—Poor law officer appointed by public authority under statutory powers—Deductions from pay during illness—Sick pay regulations not disclosed to officer—Implied term—Authority compelled by statute to make appointment—Breach of contract by authority alleged by officer—Limitation of time for commencing proceedings—Public Authorities Protection Act, 1893 (56 & 57 *Vict. c.* 61), *s.* 1.

If a local authority commits any breach of a contract which, under an Act of Parliament, it is its duty to make, then it can claim the protection of the Public Authorities Protection Act, 1893, if any action or proceeding against it for the breach of such a contract is not brought within the limit of time laid down by the Act. Where, therefore, a local authority had appointed a relieving officer for a general relief district in its area (an appointment which they were bound to make under statutory authority), and the relieving officer was absent from his duties owing to illness for six consecutive months, a claim by him to be paid the full amount of his salary for the entire period of absence (the local authority having only paid him half his salary for the last three months of his absence), was barred under s. 1 of the Public Authorities Protection Act, 1893, in respect of moneys which became due to him more than six months before the issue of the writ:—

Held also, that regulations made by the authority and not communicated to the officer did not operate as an implied term in his contract of employment.

ACTION.

In these proceedings the plaintiff, who was a senior poor law officer in the employ of the defendant council, sought a declaration (inter alia) that from and including March 8, 1936, up to and including September 13, 1936 (during which period he was absent owing to illness), he was entitled to the full amount of his salary without any deduction being made on account of such absence.

In October, 1934, the plaintiff was appointed by the defendant council to be relieving officer in charge of No. 6 Relief District at a salary of 310*l.* per annum rising by four annual increments of 20*l.* and a fifth increment of 15*l.* and a sixth increment of 20*l.* to a maximum salary of 425*l.* per annum.

From December 6, 1935, up to and including September 13, 1936, the plaintiff was ill and unable to discharge the duties of his office. Up to and including March 7, 1936, the defendant council paid the plaintiff his salary at the full rate; but from March 8, 1936, up to and including September 13, 1936, the defendant council paid the plaintiff his salary at half the full rate only.

In view of this (as he alleged) unlawful deduction from his salary, the plaintiff issued his writ dated March 1, 1937, commencing the proceedings above referred to and claiming (inter alia) that the defendant council had no power to reduce the amount of his remuneration without the consent of the Minister of Health by virtue of art. 162 of the Public Assistance Order, 1930 (1), and that he was entitled as from March 8, 1936, up to and including September 13, 1936, to the full amount of his salary without any deduction being made on account of his absence through illness.

The defendants disputed the plaintiff's claim and further relied on the Public Authorities Protection Act, 1893, s. 1. (2)

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(1) Public Assistance Order, 1930 (St. R. & O., No. 185). March 20, 1930. Art. 162: (1.) "The name "and remuneration of every senior "poor law officer shall be reported "to the Minister on his appoint"ment.

"(2.) The council [art. 6] shall "not, without the consent of the "Minister [art. 6] reduce the "remuneration of a senior poor "law officer and any reduction "approved by the Minister shall "only take effect at the expiration "of three months from the date "when the council gave notice to "the officer in writing of their "intention to make the reduc"tion."

(2) Public Authorities Protection Act, 1893, s. 1: "Where after "the commencement of this Act "any action, prosecution, or other "proceeding is commenced in the "United Kingdom against any "person for any act done in pur"suance, or execution, or intended "execution of any Act of Parlia"ment, or of any public duty or "authority, or in respect of any "alleged neglect or default in the "execution of any such Act, duty, "or authority, the following pro"visions shall have effect:

"(*a*) The action, prosecution, "or proceeding shall not lie or "be instituted unless it is com"menced within six months "next after the act, neglect or "default complained of, or, in "case of a continuance of injury "or damage, within six months "next after the ceasing thereof."

John G. Foster (*E. Gilbert Woodward* with him) for the plaintiff. The question before the Court is whether there is some implied agreement between the plaintiff and the defendant council for the payment of his full salary notwithstanding illness for a period. It is admitted there is no express agreement as to the payment of salary during a period of sickness. The defendant council made their own sick pay regulations, which it is submitted were not known to the plaintiff. Further, the consent of the Minister of Health was not obtained to any reduction in the plaintiff's salary: see art. 162. (1) [Reference was made to *Littlejohn* v. *London County Council.* (2)]

It is contended by the defendant council that any claim by the plaintiff is barred by the Public Authorities Protection Act, 1893, s. 1. (3) It is submitted, however, that the Act does not apply here, as the plaintiff's claim is one for the breach of a contract: see *Clarke* v. *Lewisham District Council* (4), *Sharpington* v. *Fulham Guardians.* (5)

Kenneth Diplock (*R. Moelwyn Hughes* with him) for the defendant council. The effect of art. 162 (2.) is to cut down the right of the plaintiff. (1) The real question seems to be, are the council's regulations as to sick pay incorporated in the plaintiff's contract or not? Where a person enters the employment of a public authority under a contract of service which on the face of it does not purport to contain the whole terms of the employment, he must, in the absence of any agreement to the contrary, be presumed to agree to the general regulations of the authority applicable to the case; compare the remarks of Scrutton L.J. in *Reigate* v. *Union Manufacturing Co. (Ramsbottom), Ld.* (6) The real test here is, if the plaintiff had been asked on the day after his appointment: Do you consider that the general sick pay regulations apply to you? he would, it is submitted, have answered, "Yes."

On the question of the applicability of the Public Authorities Protection Act, 1893, the payment by the defendant council to the plaintiff of half his full salary during the last three months of his illness was an act done in pursuance or execution of a statute. The plaintiff did not bring his action within six months after the act of the defendant council, the statute therefore applies and his claim is barred: see the case of *McManus* v. *Bowes.* (1) This and other cases establish, it is submitted, the proposition that where a local authority make a contract or quasi-contract which a statute compels them to make, then for any breach of that contract the statute may be invoked and is applicable if an action is not brought within the specified time laid down, see s. 1 of the Act of 1893 (2), and *Bradford Corporation* v. *Myers.* (3) Here what the defendant council has done was an act in execution of an Act of Parliament. [He also referred to *Sharpington* v. *Fulham Guardians.* (4)] If a statute lays down that a local authority must make a contract, then the making of the contract and the carrying it out is a statutory duty.

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(1) See note (1) ante, p. 772.

(2) [1938] 1 K. B. 78.

(3) See note (2) ante, p. 772.

(4) (1902) 19 Times L. R. 62.

(5) [1904] 2 Ch. 449.

(6) [1918] 1 K. B. 592, 605.

J. G. Foster in reply.

CROSSMAN J. The question raised in this action is whether the plaintiff, Mr. Roy Compton, who is a senior poor law officer within the meaning of art. 144 of the Public Assistance Order, 1930, employed by the defendants, the council of the County Borough of West Ham, is entitled to the full amount of his salary in respect of the period from and including March 8, 1936, up to and including September 13, 1936, without any deduction being made on account of his absence through illness.

A further question arises: whether, if the plaintiff was so entitled, his right to bring an action to recover the amount to which he is entitled is barred by the Public Authorities Protection Act, 1893.

[His Lordship stated the facts.]

The defendant council contend that the plaintiff was employed under regulations contained in a minute of the defendant council dated January 28, 1913, and in a minute of July 22, 1919. The minute of January 28, 1913, is to the following effect so far as it is material. A resolution was moved by Alderman Littler, and as an amendment it was moved by Councillor Gawthorn—the part which is material is under (*e*) A (i.)—that : " All insurable officers appointed "by resolution of the council, and all insurable clerks, care-"takers, and others who have not been appointed by resolution "of the council but who are certified by the chief officer of the "department in which they are serving to be on the established "staff of the council, shall be declared to be on the established "staff, and that the sick allowance accruing to these officers "under the Act shall be augmented to provide full pay during "the first thirteen weeks, and half pay during the second "thirteen weeks of sickness in any one period of twelve months, "provided nevertheless that such additional benefits shall "cease concurrently with the sick allowances receivable under "the Act," and under (*g*) of para. B : " That the necessary "steps be at once taken to notify all the council's employees "of the foregoing decisions." Then it says : " This was "seconded by Councillor Bacon, and . . . . it was declared to "be carried." That is what happened on January 28, 1913.

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(1) [1938] 1 K. B. 98.
(2) See note (2) ante, p. 772.
(3) [1916] 1 A. C. 242.
(4) [1904] 2 Ch. 449.

The second regulation or minute that I wish to refer to is that of July 22, 1919—that is the date it was adopted by the council—which is to this effect : " That they have received and "considered a letter from the secretary of the West Ham "Corporation Employees' Federal Council asking that all "employees after twelve months' service be classed A1 for "sick allowance as paid by the council and recommend that "the minute of the council, No. 10 (*e*) A (i.), under date "January 28, 1913 (Vol. XXVIIa, page 446), be made "applicable to employees who have been continuously "employed by the council for twelve months." That is dated July 11, 1919, but was adopted by the council on July 22, 1919. The defendant council contend that the provisions as to sick pay contained in these minutes were implied terms of the plaintiff's employment with the defendant council.

The law as between employers and employees as to sick pay has recently been considered by the Court of Appeal in the case of *Marrison* v. *Bell* (1). I think that the position at common law is that an employee is entitled to payment of his full wages while he is temporarily incapacitated by sickness unless there is a special term in the contract of employment providing otherwise, or there is some implied term, or the employee is estopped from claiming his full wages by some act on his part which is inconsistent with his right to full wages.

It is common ground in this case that there is no express term as to sick pay in the plaintiff's engagement. The question is: Was there an implied term, or is the plaintiff estopped in some way from setting up that he is entitled to the full wages? It was suggested at the beginning of the hearing before me that this matter was a test case; but on consideration I think it is really a question of fact and depends on the particular circumstances of the case. I have carefully considered the documentary evidence and the facts admitted by the parties, and I have heard the oral evidence of the plaintiff. I find nothing in this case (corresponding to the employer's membership of a friendly society, the rules of which provided that the employee was not to be entitled to sick pay while receiving wages in *Niblett* v. *The Midland Ry. Co.* (2)), which could estop the plaintiff from claiming his salary at the full rate during temporary absence owing to sickness.

I find that the plaintiff when he was appointed in 1934 did not know of the sick pay regulations which had been adopted by the defendant council; and having regard to all the circumstances I hold that there is no sufficient ground for implying as a term of the plaintiff's contract of employment the provisions as to sick pay which the defendant council had adopted.

In these circumstances it is unnecessary for me to consider the second point raised by the plaintiff, namely, that by reason of art. 162 of the Public Assistance Order, 1930 (3), the defendant council is bound to pay the plaintiff the half of his salary which was kept back, on the ground that such keeping back was a deduction within that article, para. 2, and that the case of *Littlejohn* v. *London County Council* (1) applies, it being admitted that the consent of the Minister of Health was not obtained to the keeping back of the half of the salary. In my judgment the plaintiff is entitled to a declaration as asked for by para. 4 of the prayer in the statement of claim, namely, " A declaration that from and "including March 8, 1936, to September 30, 1936, he was "entitled to the full amount of his salary, without any deduction "being made on account of his absence through illness."

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(1) [1939] 2 K. B. 187.
(2) (1907) 96 L. T. 462.
(3) See note (1) ante, p. 772.

When I say he is entitled to the declaration, that is, of course, subject to the point which I am going to consider now, as to whether his right of action in respect of this was barred by the Public Authorities Protection Act, 1893. But apart from that I think he would be entitled to that declaration.

The defendant council relied upon the provisions of that Act. Sect. 1 of that Act is as follows : " Where after the "commencement of this Act any action, prosecution, or other "proceeding is commenced in the United Kingdom against "any person for any act done in pursuance, or execution, or "intended execution of any Act of Parliament, or of any "public duty or authority, or in respect of any alleged neglect "or default in the execution of any such Act, duty or authority, "the following provisions shall have effect : (*a*) The action, "prosecution, or proceeding shall not lie or be instituted unless "it is commenced within six months next after the act, neglect, "or default complained of, or, in case of a continuance of "injury or damage, within six months next after the ceasing "thereof."

Counsel on behalf of the defendant council says that the keeping back from the plaintiff of the half of his salary which was kept back was an act done in pursuance or execution or intended execution of an Act of Parliament, and that the action not having been commenced within six months next after the act so done, the Act of Parliament applies. Counsel for the plaintiff says that the Act does not apply because the action is for breach of contract, and he relies upon the cases of *Clarke* v. *The Lewisham District Council* (1), and *Sharpington* v. *Fulham Guardians.* (2)

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(1) [1938] 1 K. B. 78.

The statement in Halsbury's Laws of England, 2nd ed., vol. 26, p. 294, para. 612, in the article on "Public Authorities and Public Officers," and in the sub-s. which is concerned with the execution of a statute, duty or authority dealing with the Public Authorities Protection Act, 1893, is as follows: "The performance, or breach, of a contract which a public "authority has the power, but not the duty, to make, is not "within the protection"—that is, the protection of the Public Authorities Protection Act. I think that that is a correct statement of the law, and I think also it would be correct to take that in an inverted form and say that the breach of a contract which a public authority has the duty to make is within the protection of the Act. It is only a breach of contract which a public authority has the power, but not the duty, to make which is not within the Act, and I think this appears from the cases of the *Bradford Corporation* v. *Myers* (3), and *McManus* v. *Bowes and Others.* (4)

I think that a breach of a contract which a public authority is by statute bound to make does come within the Public Authorities Protection Act, 1893, and as the defendant council was by art. 142, sub-cl. 1, of the Public Assistance Order, 1930, bound to make the appointment of the plaintiff, I hold that an action for breach of the terms of that appointment is an action within s. 1 of the Act of 1893. Art. 142 is this: "The "Council shall appoint a district medical officer for every "medical relief district and a relieving officer for every general "relief district formed pursuant to article 20." So that the appointment of the plaintiff was an appointment which the defendant council was bound to make under the Act. The action here has arisen in consequence of that appointment, and I hold that s. 1 of the Act applies to the action which is to remedy a breach of a contract which the defendant council was bound to make in pursuance of the Poor Law Act of 1930 and the regulations thereunder.

(1) 19 Times L. R. 62.
(2) [1904] 2 Ch. 449.
(3) [1916] 1 A. C. 242.
(4) [1938] 1 K. B. 98.

I should say that under s. 136, sub-s. 2, of the Poor Law Act, 1930, the articles contained in the Public Assistance Order, 1930, have the same effect as if they were enacted in the Poor Law Act, 1930.

The only question left is to what extent is the action barred by the Act of 1893? The plaintiff issued his writ on March 1, 1937. I think it must follow that with regard to all moneys which became due to the plaintiff before September 1, 1936, the action does not lie. It only lies as regards moneys which became due after that date. The plaintiff is entitled to a declaration as asked by para. 4 of the statement of claim, and, if the parties can agree a figure, there will be an order for payment of the actual sum which he is entitled to notwithstanding the Act of 1893.

Solicitors: *Stutfield & Son; E. E. King, Town Clerk, West Ham.*

A. R. LL.-T.

CROSSMAN J.

1939

June 21, 22, 23.

In re WOLSON.

WOLSON *v.* JACKSON.

[1938. W. 385.]

Will—Residuary bequest—Gift to child of testator contingent on legatee attaining a certain age—Death of legatee in lifetime of testator before attaining specified age—Lapse—Interest determinable at or before the death of legatee—Wills Act, 1837 (7 *Will.* 4 *&* 1 *Vict. c.* 26), *s.* 33.

Under the residuary devise and bequest contained in the will of a testator, one of the children, E. P., was entitled to a share contingently on her attaining the age of twenty-five years. E. P., having married, died in the lifetime of the testator under twenty-five, leaving issue:—

Held, that the gift to E. P. was one bequeathed to her for an interest "determinable at her death," within the meaning of the Wills Act, 1837, s. 33, and the section therefore did not apply to her interest.

ORIGINATING SUMMONS.

By his will dated September 21, 1928, Solomon Wolson (hereinafter called "the testator") after appointing his wife, V. Wolson, and his son, Alec Sidney Wolson, executors and trustees thereof, and after making certain pecuniary bequests, dealt with his residuary real and personal estate and declared that on the death or re-marriage of his wife one-fourth share of the said residue should be divided by his trustees between his three children Ethel, Alec and Hilda as and when they should respectively attain the age of twenty-five years. The testator died on April 1, 1933, and probate of his will was granted to his executors on June 8, 1933. The daughter, Ethel, was married in November, 1930, to one George O. Preiss (a defendant to the summons), and she died intestate in November, 1931, aged twenty-four years, leaving an infant daughter, the defendant Chloe T. Preiss. The testator's son Alec Sidney Wolson died in February, 1937, having attained the age of twenty-five years and leaving the first named defendant Lena Mary Jackson his legal personal representative.

Hilda Wolson was married in September, 1934, to one James Martine; she was another defendant to the summons.

On the testator's death various points arose with regard to the terms of his will and in consequence his widow as sole surviving executrix took out an originating summons for the determination of certain questions. One of these questions (No. 6) was whether the bequest to Ethel Preiss, deceased, of a one-third share in reversion of the one-fourth share of the testator's residuary estate had taken effect in the manner required by the Wills Act, 1837, s. 33 (1), or whether there was an intestacy with respect to the said share.

At the hearing the learned judge dealt with the various questions raised by the summons and made declarations thereon. The only material question calling for report was that raised by No. 6 relating to the applicability of s. 33 of the Wills Act, 1837. (1)

G. C. D. S. Dunbar for the plaintiff.

J. Neville Gray K.C. for the first defendant, Lena M. Jackson, the legal personal representative of Alec S. Jackson, deceased.

Hon. Denys Buckley for the second defendant, Mrs. D. Scorman (a sister of the testator and claiming to be beneficially interested under the will). Sect. 33 of the Wills Act does not apply to a contingent gift which fails because the contingency does not happen. This gift was determinable at the death of Ethel Preiss, if, as happened, she were to die before reaching twenty-five.

A. L. Ungoed-Thomas for the defendants George O. Preiss and Chloe T. Preiss. Sect. 33 of the Wills Act, 1837, applies to the bequest to Ethel Preiss, and the bequest to her took effect notwithstanding that she died under twenty-five.

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(1) Wills Act, 1837, s. 33: "Where any person being a child "or other issue of the testator to "whom any real or personal estate "shall be devised or bequeathed "for any estate or interest not "determinable at or before the "death of such person shall die in "the lifetime of the testator "leaving issue, and any such issue "of such person shall be living at "the time of the death of the "testator, such devise or bequest "shall not lapse, but shall take "effect as if the death of such "person had happened immediately after the death of the "testator, unless a contrary intention shall appear by the will."

E. Ronald Haylor for the defendant Joseph G. Wolson (a son of the testator by a previous marriage and claiming to be interested in the event of there being an intestacy of Ethel Preiss's share).

Quentin B. Hurst for the defendant the above-mentioned Mrs. H. Martine (a residuary legatee under the will of the testator).

CROSSMAN J. The testator, Solomon Wolson, by his will dated September 21, 1928, declared that on the death or remarriage of his wife, one fourth share of his residuary estate should be divided between his three children Ethel, Alec and Hilda, as and when they respectively attained the age of twenty-five years. [His lordship stated the facts.]

I have already made a declaration which involves the conclusion that the bequest to Ethel Preiss was contingent on her attaining twenty-five years.

Mr. Ungoed-Thomas, on behalf of G. O. Preiss and C. T. Preiss, has argued that s. 33 of the Wills Act, 1837, applies to a contingent interest and that, notwithstanding that Ethel Preiss died under twenty-five, the bequest to her of the share in question has taken effect in the manner provided by that section. The section is as follows: "Where any person "being a child or other issue of the testator, to whom any real "or personal estate shall be devised or bequeathed for any "estate or interest not determinable at or before the death "of such person shall die in the lifetime of the testator leaving "issue, and any such issue of such person shall be living at the "time of the death of the testator, such devise or bequest "shall not lapse, but shall take effect as if the death of such "person had happened immediately after the death of the "testator, unless a contrary intention shall appear by the will."

Mr. Ungoed-Thomas says that the share was bequeathed to Ethel Preiss for an interest not determinable at or before her death and therefore that it must under the section take effect as if her death had happened immediately after the testator's death, and that as if her death had happened immediately after the testator's death, she would have attained twenty-five, the bequest has taken effect in the manner provided by the section. Mr. Haylor and Mr. Buckley, who appear for parties interested in opposing this conclusion, contend that s. 33 does not apply to save a contingent interest which has already failed. In my judgment that contention is right. This is entirely a question of the construction of the section and I have to interpret what Parliament intended by the wording of the section. In my opinion the share in question, which was bequeathed to Ethel Preiss contingently on her attaining twenty-five, was bequeathed to her for an interest determinable at her death within the meaning of the section. Consequently, in my view the section does not apply to the interest at all. I think that the use in the section of the words " shall not lapse " shows that the purpose of the section was to provide against the effect of the death of a child in the lifetime of the testator, and not against the effect of death without attaining the age the attainment of which is a condition of the bequest. I hold, therefore, that the bequest has not taken effect in the manner provided by s. 33 of the Wills Act, 1837, and that there is an intestacy with respect to the share in question.

Solicitors : *Trollope, Winckworth, Crump & Sprott ; W. A. G. Davidson & Co. ; William Easton & Sons ; Greenwood & Knocker.*

A. R. LL.-T.

SIMONDS J.

1939

May 19.

In re CAWSTON'S CONVEYANCE AND THE SCHOOL SITES ACT, 1841.

HASSARD-SHORT *v.* CAWSTON.

[1939. C. 1317.]

Education—Elementary school—Conveyance on sale of site for school—School in use for fifty years—Closed as being redundant—Reverter of site to grantor—School Sites Act, 1841 (4 *&* 5 *Vict. c.* 38), *s.* 2—*Public Parks, Schools and Museums Act,* 1871 (34 *Vict. c.* 13).

By a conveyance made in 1883 a plot of land belonging to an owner in fee simple in possession was sold and conveyed under the School Sites Act, 1841, in consideration of 250*l.* to the vicar and churchwardens of a parish as trustees, for the purposes of the erection thereon of a school for the labouring and poorer classes of the parish and of a schoolmaster's house. The school and house were erected and the school used as an infant's school until 1937, when, having become redundant owing to the building of a new council school in the neighbourhood, it was closed by the trustees :—

Held, that, although it was conveyed for valuable consideration by an owner entitled in fee simple, it reverted to the personal representatives of the grantor under the proviso in s. 2 of the Act.

Dennis v. *Malcolm* [1934] Ch. 244 applied.

SUMMONS.

The summons was taken out by Canon F. W. Hassard-Short, the vicar, and D. C. Simpson and J. H. Golland, the churchwardens, of the parish of St. Luke's, Bromley Common, and asked whether in the events which had happened, a school, then vested in them as trustees, reverted to the grantor of the site or his representatives under the School Sites Act, 1841.

By a conveyance dated August 20, 1883, one Samuel Cawston, in consideration of 250*l.*, the full value, conveyed to the vicar and churchwardens of Holy Trinity, Bromley, a piece of land in Addison Road, Bromley, for the purposes of an elementary school and schoolmaster's house, to be used for ever as a school for children or adults of the labouring, manufacturing, or other poorer classes of the parish, but for no other purpose, under the School Sites Act, 1841. On a division of the parish the school became vested in the vicar and churchwardens of St. Luke's, Bromley Common. The school was built, and was so used until 1937, when, owing to the building of a much larger council school in the neighbourhood, it was closed.

Sect. 2 of the School Sites Act, 1841, provided that any person being seised in fee simple, fee tail or for life in any manor or lands of freehold, copyhold or customary tenure might grant, convey or enfranchise by way of gift, sale or exchange, in fee simple or for a term of years, any quantity not exceeding one acre of such land as a site for a school for the education of poor persons, subject to the following proviso :—

" Provided also, that upon the said land so granted as "aforesaid, or any part thereof, ceasing to be used for the "purposes in this Act mentioned, the same shall thereupon "immediately revert to and become a portion of the said "estate held in fee simple or otherwise, or of any manor or "land as aforesaid, as fully to all intents and purposes as if "this Act had not been passed, anything herein contained "to the contrary notwithstanding."

T. K. Wigan for the plaintiff. There are but few authorities on s. 2 of the School Sites Act, 1841, but many schools which come under it are now becoming redundant and being closed.

It is submitted that, where the conveyance under the Act is by an owner in fee simple absolutely entitled, there is no reverter. In such a case he could have conveyed without recourse to the powers of the Act. The Act was passed to facilitate grants for schools, because at that time most of the owners of land who desired to grant land for schools were tenants for life of strict settlements and had no powers of gift, sale, or exchange. Moreover, apart from this, much of the land suitable for school sites was waste of the manor and could not be sold or conveyed so as to bar the rights of the commoners.

The effect of the School Sites Act was to enable tenants for life to make grants which would be binding on the remaindermen, and lords of manors holding in fee simple to make grants of waste land of the manor which would be binding on the commoners, but, if the site ceased to be used as a school, the rights of the remaindermen or commoners, as the case may be, revived. In *In re Peel's Release* (1), Sargant J. confirms that this was the object of the Act. If the grant is made by an owner in fee simple and is not waste of the manor, there is no reason why it should revert if it ceases to be used as a school. Moreover the proviso should not be construed as if it said that the land should revert as if no such grant had been made, as is the case under ss. 3 and 4 of the Act.

But if the Court is against me on this point, I submit that, if the grant is made by an owner in fee simple for a full consideration in money, there is no reverter. That is the case here, while in *Dennis* v. *Malcolm* (2) there was a deed of gift.

The grantor had power to convey as absolute owner but chose to convey under the powers of an Act which ex hypothesi must be deemed not to have been passed.

This is therefore analogous to the defective execution of a power. Where the grantor has received full value, the words "in exercise of any other power him thereunto enabling" should be implied in the conveyance. See Farwell on Powers, 3rd ed., p. 378: *Chapman* v. *Gibson* (3) and *Cotter* v. *Layer*. (4)

Equity will aid the defective execution of a power if it is for valuable consideration. The grantor must be deemed to have conveyed the site in pursuance of every power which he had. In the case before Clauson J. the conveyance was voluntary and there was therefore no reason why any words should be implied.

Further the grantor conveyed as beneficial owner and this implied the usual covenants for title, for further assurance and quiet enjoyment. He intended to give the purchasers the best title he could.

(1) [1921] 2 Ch. 218, 224.
(2) [1934] Ch. 244.
(3) (1791) 3 Bro. C. C. 229.
(4) (1731) 2 P. Wms. 623.

There is an unreported decision of Eve J. in *Dixon* v. *Rackham* (1), where the conveyance was made for value and he held that the reverter did not operate, but in that case it is not clear what were the grounds of the decision.

Thirdly, the School Sites Act, 1841, does not exempt the conveyance from the necessity of enrolment under the Mortmain Acts. At the date of this conveyance the Act 34 Vict. c. 13 was in force. This was afterwards repealed and re-enacted in the Mortmain and Charitable Uses Act, 1888. The school in this case does not come within the exemption contained in s. 6 of the later Act, because it might have been used for adult as well as elementary education. In fact it has always been used as an infant school, but if it could have been used for technical education of adults, the conveyance would have required enrolment. It never was enrolled, and was therefore ineffective to convey the property. The vicar and churchwardens of St. Luke's, Bromley, have therefore acquired an indefeasible title, free from reverter, by adverse possession: see *Churcher* v. *Martin.* (2)

J. V. Nesbitt for the defendant. The argument that there cannot be a reverter where the conveyance is by an owner in fee is covered by the decision in *Dennis* v. *Malcolm.* (3) The real difficulty in the case is, assuming there is a reverter, to whom does the property revert. The only difference between this case and *Dennis* v. *Malcolm* (3) is that here the land was sold, and in that case it was given for the school. This was a single plot of land standing by itself and not part of a large estate.

The School Sites Act, 1841, s. 2, clearly applies to a " gift, sale, or exchange " in fee or for a term of years. If a grant is made to a corporation which afterwards ceases to exist, the land reverts to the original owner: *In re Woking Urban District Council (Basingstoke Canal) Act,* 1911. (4) The law of escheat did not apply in such a case. The vicar and churchwardens, having perpetual succession, are in the same position as a corporation.

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(1) Unreported (1913. D. 179).

(2) (1889) 42 Ch. D. 312.

(3) [1934] Ch. 244.

(4) [1914] 1 Ch. 300.

SIMONDS J.

1939

CAWSTON'S CONVEYANCE AND THE SCHOOL SITES ACT, 1841, *In re.* HASSARD-SHORT *v.* CAWSTON.

On the first two points, therefore, the case is covered by *Dennis* v. *Malcolm* (1), and on the third, the school having been conveyed and used mainly for elementary education, there was no necessity for enrolment of the conveyance.

SIMONDS J. In this case a question has been raised which involves the consideration of the School Sites Act, 1841.

By a conveyance dated August 20, 1883, Samuel Cawston, for the sum of 250*l.*, which appears to have been the full value, conveyed to the vicar and churchwardens of the Parish of Holy Trinity, Bromley Common, who are in the deed called the trustees, a certain piece of land situated at Bromley Common and particularly described in the conveyance together with the school thereon erected and built " to hold "unto and to the use of the said trustees and their "successors in fee simple for the purposes of the said Act "and upon trust subject nevertheless to the proviso hereinafter "contained to permit the said premises and all buildings "thereon now or hereafter erected to be for ever hereafter "appropriated and used as and for a school for the education "of children and adults or children only of the labouring "manufacturing and other poorer class in the Parish of Holy "Trinity Bromley Common aforesaid or of any new district "which may hereafter be assigned therefrom and as a residence "for the teacher or teachers of the said school and for no "other purpose." That conveyance purported to be made under the authority of the Act which I have mentioned, the School Sites Act, 1841, which in the conveyance is called: "an Act passed in the fifth year of the reign of her Majesty "Queen Victoria intituled ' An Act to afford further facilities "' for the conveyance and endowment of sites for schools' " and of the amending Act of 1844. That conveyance having been thus made in the year 1883, the school was used for the purposes which were therein prescribed until in or about the month of June, 1937, when it appeared that the school had become out of date and expensive to maintain and that the building of large modern schools in the neighbourhood had

(1) [1934] Ch. 244.

made the Church of England school redundant. Notice was then given to the local education authority of intention to close the school, and in fact it has not been used as a school since the end of the summer term, 1938.

In those circumstances the question which arises is whether there has been a reverter to the estate of the grantor, Samuel Cawston, under the provisions of the School Sites Act, 1841. That Act, so far as it is material, provided by s. 2: "That "any person, being seised in fee simple, fee tail, or for life, "of and in any manor or lands of freehold, copyhold, or "customary tenure, and having the beneficial interest therein, "or in Scotland being the proprietor in fee simple or under "entail, and in possession for the time being, may grant, "convey, or enfranchise by way of gift, sale, or exchange, "in fee simple or for a term of years, any quantity not "exceeding one acre of such land, as a site for a school for the "education of poor persons, or for the residence of the school-"master or schoolmistress, or otherwise for the purposes "of the education of such poor persons in religious and useful "knowledge." Then there are certain provisos to which I need not refer, and finally there is this proviso: "Provided "also, that upon the said land so granted as aforesaid, or "any part thereof, ceasing to be used for the purposes in this "Act mentioned, the same shall thereupon immediately revert "to and become a portion of the said estate held in fee simple "or otherwise, or of any manor or land as aforesaid, as fully "to all intents and purposes as if this Act had not been passed, "anything herein contained to the contrary notwithstanding."

It has been argued on behalf of the plaintiffs in these proceedings, the vicar and churchwardens of the parish, that that proviso for reverter has, in this case, no operation. In the first place they say that the section is not intended to apply to the case where the property has been conveyed by an owner in fee simple. Secondly, that it is not intended to and cannot apply to the case where the grant has been made for full consideration in money. Thirdly, that this conveyance was never enrolled, that at the time of the School Sites Act, 1841, and of the amending Act of 1844, it was necessary under the Statutes of Mortmain to enrol a conveyance whether made under the authority of the School Sites Act or otherwise, if it was made for charitable purposes, that the conveyance not having been enrolled was altogether void, and that accordingly those who have been in possession ever since the grant of 1883 have been in adverse possession, and therefore the title of the vicar and churchwardens is protected by adverse possession and there can be no question of reverter.

So far as the first of these three points is concerned, any doubts which I might have had are resolved by the authority of the case of *Dennis* v. *Malcolm* (1), where exactly the same point was argued before Clauson J. and he decided that the provisions of the section were applicable to the case of the grant by the owner in fee simple of the fee simple of the land. He dealt with the argument raised which has also been addressed to me, and said (2): "A very subtle argument has been "founded upon those sections"—that is to say ss. 2, 3 and 4 of the Act of 1841—"it has been contended that it is very "significant that s. 2 provides that the reverter must "operate as if the Act had not been passed, but does not "contain the additional words appearing in ss. 3 and 4— "namely, 'as if the grant had not been made': and it is said "that you must treat the grant as an existing grant, assume "the Act has not been passed, and see what the result is. "When I turn to the grant, I find that the utmost care has "been taken to explain that the grantor, Mr. Antrobus, was "acting under the authority of the School Sites Act, 1841, "and was making the grant to the minister and churchwardens "and their successors for the purposes of the said Act. In "my view it is plain that the deed is intended to operate "and operate only under the Act, and the effect of dealing "with the matter as if the Act had not been passed is to "destroy the authority under which and under which alone "the grant was intended to operate: the result is therefore "in my view precisely the same as if the statute had said "the reverter is to take place as if the grant had not been "made. If the deed had gone on to use some such expression

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(1) [1934] Ch. 244.

(2) Ibid. 250.

"as would enable me to hold that it was intended to operate "either under the Act or independently of the Act, the result "might be different. But I find no such expression." In view of that reasoned judgment on the argument which was addressed to the Court, it would be impossible for me, whatever my own views might be, to come to a different conclusion.

The learned judge's judgment has been subjected to a close analysis by Mr. Wigan in his able argument, and he has addressed to me some arguments which were not put before the learned judge, but I do not find it possible to differ from the learned judge, and I must hold that s. 2 is applicable to the grant by an owner in fee simple of the fee simple or to any other grant. Then, says Mr. Wigan, this case is to be distinguished from *Dennis* v. *Malcolm* (1), because there the grant was voluntary and here it was for full consideration. It is true that that distinction might be taken, but, when I look at the Act, I find that s. 2 distinguishes in no way between a grant by way of gift, or by way of sale, or by way of exchange. In each case the policy of the Act is to provide that on the land ceasing to be used for the purposes of the Act mentioned there is to be a reverter.

Accordingly, I must hold that the decision of Clauson J. is one which binds me equally with regard to a case where there has been consideration for a grant as to a case where there has been no consideration, and that view of the section is certainly enforced by the provisions of ss. 3 and 4 of the Act where there has been a grant by the Chancellor and Council of the Duchy of Lancaster or by the Duchy of Cornwall. It is clear that a case is contemplated where money has been paid for the grant, because the section proceeds to deal with what is to happen to the moneys received on such grant, but there is the same provision as to reverter. I must therefore hold here that, notwithstanding that full value was received by the grantor on the grant, yet, since the purpose for which the land was granted has ceased, there must be a reverter.

Then the last point is taken, which I have already stated—namely, that the possession has been adverse. That rests on this, that there was the necessity for enrolment, and as there was no enrolment the deed was void. It is quite true that under the law as it stood in 1841 and 1844 a conveyance made under the authority of the School Sites Acts required to be enrolled, and, if there was no enrolment, the conveyance was void. Was it necessary in 1883? That turns on the meaning and effect of the Act which was passed in the year 1871 (34 Vict. c. 13). That was an Act to facilitate gifts of land for public parks, schools and museums. It is necessary to look at s. 3, the definition section. It is thereby provided that " the words ' elementary school ' shall mean a school or "department of a school at which elementary education is "the principal part of the education there given, and shall "not include any school or department of a school at which "the ordinary payments in respect of the instruction from each "scholar exceed ninepence a week; the word ' school-house ' "shall include the teacher's dwelling-house, and the playground "(if any), and the offices and all premises belonging to or "required for a school."

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(1) [1934] Ch. 244, 250.

I now turn to s. 4, which provides: " From and after the "passing of this Act all gifts and assurances of land of any "tenure, and whether made by deed or by will or codicil, "for the purposes only of a public park, a school-house for an "elementary school, or a public museum, and all bequests of "personal estate to be applied in or towards the purchase of "land for all or any of the same purposes only, shall be valid "notwithstanding the statute of the ninth George the Second, "chapter thirty-six, and other statutes commonly known as "the Statutes of Mortmain." It was the statute of the ninth George the Second which made enrolment necessary. That statute out of the way, no enrolment was necessary. The only question here, then, is this: Was this a grant made of a school-house for an elementary school within the meaning of the statute to which I have referred?

It has been argued by Mr. Wigan on behalf of the vicar and churchwardens that this was not a grant of a school-house for an elementary school, and in aid of that argument he refers to the fact that the purpose defined in the conveyance is: "a school for the education of children and adults or "children only of the labouring manufacturing and other "poorer class in the Parish of Holy Trinity Bromley Common." It appears to me that that is a purpose which properly falls within the definition of "elementary education" contained in s. 3 of the statute of 34 Vict. c. 13. Elementary education is not the less the principal part of the education because it is possible that some education might be given to adults which may not be of an elementary character. Accordingly, it was not necessary to enrol this conveyance of 1883, and therefore the deed was not void, and the possession of the vicar and churchwardens has not been adverse. It follows that the reverter under s. 2 of the School Sites Act, 1841, must take place and the land (or the proceeds of sale, since it has now been sold,) belongs to the estate of Samuel William Cawston.

I do not propose to decide what happens to it now it is there; that must lie between the various persons who are interested or derive title under his will.

I should have said that a case was called to my attention which came before Eve J. on motion for judgment. It is not reported in any of the recognized reports, and the only note I have of it is in a publication called The Local Government Chronicle, which does not give me any guidance at all as to the arguments, at least on one side, which were addressed to the learned judge or the reasons for his decision, and I am not able to accept that as an authority to displace the view which I must form having regard to the decision of Clauson J. in *Dennis* v. *Malcolm.* (1)

Solicitors: *Day & Son; Dennes & Co.*

(1) [1934] Ch. 244, 250.

H. L. L.

SIMONDS J.

1939 June 7.

In re CAREW.

CHANNER *v.* FRANCKLYN.

[1939. C. 1038.]

Will—Construction—Annuities—Settlement of capital required to produce annuities—Estate insufficient for payment in full—Abatement—Administration—Settled legacies.

By a will the trustees were directed, after the determination of a life interest, to hold the residue upon trust to pay thereout certain legacies, to pay two annuities of 500*l.* a year each, and after the death of each annuitant to hold the capital representing such annuity upon trust for such persons as the annuitant should by will appoint and in default of appointment upon trust for persons named, who were also pecuniary legatees and, after the payment of further legacies, residuary legatees.

The estate was insufficient to pay the legacies in full and to provide all the capital necessary to produce income to meet the two annuities. The trustees having taken out a summons to obtain the directions of the Court as to the construction of the will and the administration of the estate:—

Held, that the bequest of the two annuities and afterwards of the capital necessary to produce them must be construed as creating settled legacies of sums sufficient, when invested in Consols at 2½ per cent., to produce 500*l.* a year each, and that those legacies must abate rateably with the other legacies, so that the annuitants would only receive such income as they would produce.

In re Farmer [1938] W. N. 411 and *In re Nicholson* [1938] 3 All E. R. 270 distinguished.

SUMMONS.

The summons was taken out by the plaintiffs as trustees of the will of Mrs. Rose Maud Carew, deceased. The will was made on January 27, 1927, and the testatrix died on June 2, 1934. Probate of the will was granted on August 27, 1934.

The facts as stated by the learned judge were as follows: By her will the testatrix made a residuary devise and bequest of all her real and personal estate not otherwise disposed of on trust for sale, and she directed that the net income arising from her residuary trust fund as therein defined should be paid to her sister Blanche during her life for her separate use without power of anticipation. Her sister Blanche survived her, and died on October 31, 1938. The testatrix further directed that after the death of her sister her residuary trust fund should be held on certain trusts—namely, to pay to each of the children of one John Warrington Carew (other than Gerald Carew) who should be living at the death of the survivor of herself and her sister, the sum of 250*l.* free of duty, then to pay to her cousin Mary Brenda Francklyn, a party to these proceedings, during her life, the yearly sum of 500*l.* free of duty, and after her death to hold the capital representing such yearly sum of 500*l.* on such trusts as the said Mary Brenda Francklyn should by will appoint, and if she should die intestate to hold such capital and the income thereof on the trusts thereinafter declared in favour of the children of the said John Warrington Carew. There was a similar direction with regard to the payment of an equal yearly sum to her cousin Leila Caroline Francklyn, and a similar disposition of the capital representing such yearly sum. There was then a direction to pay a number of other pecuniary legacies of substantial amounts. Finally there was a direction to hold the residue of the residuary trust fund subject to the payment of the duty on the reversionary legacies bequeathed by the will on trust to pay and divide the same among all or any the children or child of the said John Warrington Carew, other than Gerald Carew, who should be living at the death of the sister of the testatrix, and if more than one in equal shares.

The summons asked whether, in the events which had happened—namely, the insufficiency of assets of the testatrix—the trustees ought in respect of each of the annuities given by the will to ascertain what capital sum invested in 2½ per cent. Consols would produce the amount of such annuity free of duty, and whether the respective capital sums so ascertained ought to be abated rateably with the pecuniary legacies, and if so (i.) whether the annuitants were entitled to be paid their annuities in full out of the capital and income of the abated capital sums, or (ii.) whether the respective annuitants were only entitled to the income produced by the abated capital sums respectively.

Gerald Upjohn for the plaintiff.

Herbert Hart for the defendant annuitants. It is said to be impossible to value the annuities and then pay the abated value to the annuitants, as there are remaindermen. But the gift of capital to them has failed. This is a general power of appointment and the interest of any possible appointees is merely spes successionis.

The testatrix never directed any sum to be set aside to provide the annuities and she was dealing with a sum of capital which cannot in fact exist. The rights of the annuitants are paramount and the case resembles *In re Farmer* (1) and *In re Nicholson.* (2)

Because of the curious form of the gift of capital the testatrix must have intended a very large measure of priority to be given to the annuities. Unless the annuitants have each received 500*l.* a year, there cannot be anything left for the remaindermen. The summons suggests several alternatives such as that the annuitants should have a right to resort to corpus to supplement any deficiency in income, or that the annuity fund should be abated and a reduced annuity paid out of the income. I claim to have the actuarial value of the two annuities ascertained and abated without any competition with legatees entitled in remainder.

L. W. Byrne for the pecuniary legatees. The case should be treated as if the testatrix had given legacies of the amounts required to produce these annuities, and had then settled them: see *In re Richardson.* (3) Annuities should be treated as legacies and abated equally with them. A settled legacy must abate on the same footing as an ordinary legacy.

Maurice Berkeley for other legatees. There is no power here to resort to capital to supplement any deficiency in income as there was both in *In re Farmer* (1) and *In re Nicholson.* (2) There is nothing to give priority to the annuitants over the reversionary legatees, and both abate rateably. These gifts should be treated as settled legacies.

SIMONDS J. [having stated the facts, proceeded:] That

(1) [1938] W. N. 411.
(2) [1938] 3 All E. R. 270.
(3) [1915] 1 Ch. 353.

appears to be a simple enough disposition, but the difficulty which has arisen is due to the fact that the testatrix has over-estimated the value of her estate, which is quite inadequate to provide the legacies which she has given subject to her sister's life interest and also the capital sums which are necessary to provide the two yearly sums of 500*l*.

Before I come to consider what in those circumstances has to be done I think it is necessary to see, without regard to that position, what is the true construction of the will. The only point on which any difficulty arises is what is the true meaning and effect of the disposition in favour of Mary Brenda Francklyn and a similar disposition in favour of Leila Caroline Francklyn with a gift over of the capital sum mentioned in each case.

It is to be noticed that the testatrix, while not directing that a sum shall be set aside to provide the yearly sum of 500*l*., yet has proceeded on the assumption that such a sum has been set aside, for she directs her trustees to pay her cousin during her life the yearly sum of 500*l*. free of duty, and after her death to hold the capital representing such yearly sum of 500*l*. on trusts.

It appears to me that I must construe that as being a settled legacy of such a sum as will, when invested, produce the yearly sum of 500*l*., and by " when invested " I mean when invested in 2½ per cent. Consols, so that with all reasonable certainty the trustees may know that that sum will produce the 500*l*. It might of course be that by reason of a capital levy, or something of that kind, that sum might be reduced. But I do not think I am concerned to take such eventualities into account, and I must regard this as nothing more than a settled legacy of a capital sum adequate to produce 500*l*., of which therefore the annuitant may be regarded as the life tenant, and the persons entitled to the reversion as reversioners in the ordinary sense.

That being so, I then have to consider what results from the inadequacy of the estate, and having come to that conclusion it seems to me that the answer is a simple one. This is a settled legacy, but a settled legacy is subject to abatement in just the same way as any other legacy. The amount of it will be ascertained in the way which I have described, and it will abate rateably with the other legacies.

I will assume, then, a legacy the amount of which has been ascertained, and which has abated in the way that I have described. The question then arises what is to be done with that sum so ascertained, as between the tenant for life and the reversioner of the legacy. Again it seems to me that the answer to that must be quite clear. Treating this, as I do as a matter of construction, as an ordinary settled legacy, it is clear that the life tenant is entitled to the interest during her life of the sum which has been so abated, and instead of getting her 500*l.* a year produced by a capital sum adequate to produce 500*l.* a year she will get whatever is produced by this abated sum, which may be something substantially less than 500*l.* a year. But that is the result of an abatement of all the benefits which are given by the testatrix to the several objects of her bounty.

I am conscious that in coming to the conclusion to which I have come I have not reached quite the same result as that which was reached by Crossman J. in *In re Nicholson* (1), or Farwell J. in *In re Farmer* (2), but, as was pointed out by Crossman J. and equally by Farwell J., this is primarily a question of construction, the answer to which must turn on the particular language used in the will under review. Here I do not find the words which Farwell J. found, enabling him to say that the rights of the persons whom I have called the reversioners could be defeated for the benefit of the person who might be called an annuitant or life tenant. Equally I do not find anything in this will which would justify me in taking the course which Crossman J. took in *In re Nicholson* (1), of first of all finding a settled legacy of so much and treating that amount as subject to abatement, but then giving to the annuitant the whole amount of her annuity, so as, it might be, to exhaust the whole of the settled fund so abated. Ultimately, as I have already said, the question must turn on the language of the particular will, and in this case I can find nothing

(1) [1938] 3 All E. R. 270. (2) [1938] W. N. 411.

which would justify me in treating the disposition of the testatrix as anything else than a settled legacy, with a life tenant and reversioners, whose interests must abate in the same way as any other life tenant and reversioner.

Solicitors: *Sharpe, Pritchard & Co., for Moger & Couch, Wiveliscombe, Somerset.*

H. L. L.

C. A.

1939

June 14, 15, 16, 19, 20, 21; *July* 6.

WESTHOUGHTON COAL AND CANNEL COMPANY, LIMITED *v.* WIGAN COAL CORPORATION, LIMITED.

[1934. W. 2154.]

Mines and minerals—Flooding of mine—Defendants' construction of water tunnel through land of adjoining mineowners—Water passing through tunnel from neighbouring area through a mine to defendants' pumping pit—Cesser of defendants' control of tunnel or water passing through it—Subsequent stopping of pumping—Resulting flooding of plaintiffs' mine—No liability for damages.

In 1886 the defendants arranged with the S. L. Co. as a minerlike operation for the construction at their expense of a tunnel in land belonging to neighbouring mineowners to carry water from the disused R. area through the mines in the S. L. land to a pumping pit on the defendants' land from which, under successive agreements between the defendants and the S. L. Co., the water was pumped to the surface. From 1916 onwards the defendants ceased to have any control of the tunnel or the water flowing through it, and after their agreement with the S. L. Co. had terminated and the part of their mines affected had been worked out they ceased to pump the water collecting at the pumping pit, which consisted of the water passing through the tunnel and water flowing naturally as the result of mining operations from the S. L. and the defendants' mines into the pit. The result was that this water was headed back into the S. L. area and escaped from there into the adjoining mines of the plaintiffs and flooded them. In an action by the plaintiffs against the defendants for damages it was admitted that their claim must be limited to injury caused by water flowing through the tunnel and so on to their land:—

Held, that, as the defendants had no control of the water flowing through the tunnel, they were under no liability for failing to take any steps to prevent its flowing into the plaintiffs' mines and flooding them.

Decision of Luxmoore L.J. (ante, p. 393) affirmed, but for different reasons.

APPEAL from Luxmoore L.J. sitting as an additional judge of the Chancery Division. (1)

These proceedings were instituted by the plaintiffs against the defendants on July 14, 1934, claiming damages for injury alleged to have been caused by the defendants or their predecessors in title, the Wigan Coal and Iron Company, Ld., by the flooding of a mine worked by the plaintiffs known as the Westhoughton Bone Mine by the discharge of water into that mine on and after August 11, 1933. Nearly three years later the plaintiffs amended their statement of claim pursuant to an order dated May 4, 1937, so as to enlarge their claim for damages by adding further claims in respect of the alleged flooding of another mine worked by the plaintiffs known as the Westhoughton Ravine Mine by the discharge of water into that mine as from November 13, 1936, and of two further seams of coal, known respectively as the King Coal and the Cannel Seams, belonging to or leased by the plaintiffs and situated at higher levels than the Westhoughton Ravine Mine. It was common ground that the Westhoughton Bone and Ravine Mines had been flooded and the working of them abandoned.

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(1) Ante, p. 393.

The only part of the case reported in the Court of first instance related to the question of the defendant company's liability, and by arrangement this part was argued first in the Court of Appeal on the assumption of facts stated in the judgment of Goddard L.J.

The facts and the contentions of the parties were fully stated by Luxmoore L.J. (1), but for the purpose of the appeal the facts are sufficiently stated by Goddard L.J. in the judgment of the Court.

Luxmoore L.J. said it was well settled that a mineowner was entitled to get all the minerals in his own mine and, provided he worked in a skilful and usual course of mining, he would be under no liability for damage if the water that collected in his mine in the course of his working escaped and flowed by gravitation to a lower mine. But the mineowner would be liable if he conducted water from his mine to the lower mine by means of some opening made or other work executed with the express purpose of so conducting the water and not for the purpose of getting minerals. Here the claim against the defendants was in respect of water which had passed through a tunnel made by them for the purpose on to a neighbour's land and so to their own land, and which on the cessation of pumping had passed on to the plaintiffs' land. The answer to the question whether the construction of the artificial channel rendered the maker of it liable to the owner of the lower mine depended on whether the conducting of water through the artificial channel had increased the burden on the owner of the lower mine, and the time for determining that was the time when the artificial tunnel was made. He could not accept the argument that when once an artificial waterway was made in a mine, its maker was for all time liable for any damage done to another mine by reason of the future escape of the water flowing down the artificial watercourse into the other mine. Here the tunnel was constructed in 1886, and there was a barrier which prevented any water flowing through the tunnel on to the plaintiffs' mine until, as a result of workings by the Scot Lane Company and the plaintiffs, the barrier was removed in 1931 or 1932. At the time when the tunnel was made the Westhoughton Bone Mine into which the water subsequently flowed was not being worked. It was impossible in these circumstances to hold that the burden on the plaintiffs in respect of their Westhoughton Bone Mine was increased by the making of the tunnel.

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(1) Ante, p. 393.

His Lordship then dealt with the facts and decided in favour of the defendants on the facts also.

The plaintiffs appealed. The appeal was heard on June 14, 15, 16, 19, 20, 21, and judgment given on July 6, 1939.

In view of the nature of the decision by the Court it is unnecessary to report the bulk of the legal arguments, and the arguments as reported deal only with the single point decided.

K. E. Shelley K.C., Hon. H. Fletcher Moulton and *W. J. Kenneth Diplock* for the appellants. It makes no difference that the tunnel in question was made on other persons' lands and that the water flowed through it on to the Scot Lane land and so to the defendants' land. It is the act of allowing the water so brought through the artificial channel to flood the plaintiffs' mine that gives rise to the right of action, and the defendants are liable because they had the artificial tunnel made that brought the Ridgway water to a position from which, on the cessation of pumping, it could reach the plaintiffs' mines and flood them.

Hon. Sir Stafford Cripps K.C., *Charles Harman K.C.*, *Wilfrid Hunt* and *G. Granville Slack* for the respondents. The respondents are not responsible for the water running from the Ridgway area to the Scot Lane area through the tunnel made in 1886, which only overflowed into the plaintiffs' mine nearly fifty years afterwards. The respondents have no control over the tunnel and the flow of water through it, and the plaintiffs have sued the wrong defendants.

Shelley K.C. in reply. In 1933 water was flowing from Ridgway to a place from which it escaped on to the appellants' land. That gives them a good cause of action: *Hurdman* v. *North Eastern Ry. Co.* (1)

[SIR WILFRID GREENE M.R. At the relevant time water flowed from Ridgway land through the Scot Lane land on to the defendants' land and after the pumping ceased passed on to the plaintiffs' mine, and at that time the defendants had no interest in or power to go on to the site of the artificial channel they had originally made; that being so, are not the defendants in the position of persons whose neighbours are sending water on to their land? If so, and they do nothing to prevent it flowing on the plaintiffs' land they can be under no liability.]

The fact that the defendants cannot go on to other persons' land to abate the flow of water is immaterial. The defendants' predecessors had caused to be made at their expense the artificial tunnel without which the Ridgway water could never have reached the plaintiffs' land. That is the act which gives rise to the defendants' liability as soon as the water escapes on to the plaintiffs' land and causes damage. The defendants are liable because they have brought water on to the plaintiffs' land.

[SIR WILFRID GREENE M.R. This argument assumes that the water is brought once for all. Can it be said that when the overflowing into the plaintiffs' mine occurred, the defendants were bringing part of that water from the Ridgway land?]

The defendants had the opportunity of preventing the injury consequential on their earlier act, and they did not

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(1) (1878) 3 C. P. D. 168.

C. A.

1939

WEST-HOUGHTON COAL AND CANNEL CO. v. WIGAN COAL CORPORATION.

do so. They are therefore liable: *Roswell* v. *Prior* (1); *Thompson* v. *Gibson* (2); *Belvedere Fish Guano Co.* v. *Rainham Chemical Works, Ld.* (3)

[CLAUSON L.J. The essence of those cases was that an immediate and continuing nuisance had been created in respect of which a right of action at once arose. Here the making of the tunnel in 1886 was not a nuisance in respect of which the plaintiffs then had a cause of action.]

Nuisance is not actionable except on proof of damage. It is said that it makes all the difference that the defendants had lost the right to stop the flow of water through the tunnel before the water reached the plaintiffs' mine. But on legal principles how does that matter? The defendants have done everything to make them liable as soon as the escape of water causes damage.

[SIR WILFRID GREENE M.R. May not the true rule be that a man who brings a dangerous thing on to land is liable if he fails to keep it in so long as he remains the owner of the land, but no longer?]

No. It is the combined acts of enabling the water to get on to the Scot Lane land and their own land and of afterwards allowing it to escape on to the plaintiffs' land that makes the defendants liable.

Cur. adv. vult.

1939. July 6. GODDARD L.J., who delivered the judgment of the Court (Sir Wilfrid Greene M.R., Clauson and Goddard L.JJ.), said: This is an appeal from a judgment of Luxmoore L.J. dismissing an action brought by the plaintiffs, who claimed damages for the flooding of a mine worked by them known as the Westhoughton Bone Mine situate in the South Lancashire coalfield. They alleged that this mine had been flooded by water introduced into the mine on or after August 11, 1933, coming from other workings in the neighbourhood known as the Ridgway workings and that the defendants

(1) (1701) 12 Mod. 635.

(2) (1841) 7 M. & W. 456.

(3) [1920] 2 K. B. 487, 489.

were responsible for bringing this water from the latter into their Bone Mine. Further claims were made in respect of floodings of other mines of the plaintiffs, but it was conceded by them that, if the defendants were not liable in respect of the Bone Mine, neither were they for what happened at the other mines. In this coalfield there are several seams of coal worked from shafts belonging to various owners, and for the purpose of this judgment it is only necessary to mention four: the Cannel, which is nearest the surface; the King Coal, which is next beneath it; the Bone, which is still lower; and the Arley, which is the deepest of all. The plaintiffs' mines are situate to the south of the area with which we are concerned. To the north-west of their mines lies the Scot Lane mining area, coloured green on the maps, and this is intersected by a large fault running roughly north and south. To the west of and adjoining the Scot Lane workings lies a large area coloured red on the map which was worked by the defendants, who also owned a pumping station known as the Aspull pumping pit, where for many years they pumped water rising not only in their own pits but also in the Scot Lane area. Towards the north of the Scot Lane area and to the west of the fault is a group of three pits known as Scot Lane 1, 2 and 5, and to the south, quite close to the defendants' pumping pit, is another Scot Lane shaft known as number 4. To the north-east of the Scot Lane area and east of the fault are some old workings called Ridgways coloured yellow on the map, and this area was in part separated from Scot Lane by the fault and also by some mining land owned by one Dorning. Until the year 1886 there had been on Ridgways land a pumping station which dealt with the water in the King Coal Seam, but which was in that year or 1887 closed down in the circumstances which will appear hereafter. In the year 1871 an agreement was made between the defendants and the owners of the Scot Lane area whereby the former undertook to pump at the Aspull pit all the water which came to that pit from the Scot Lane workings for an annual payment of 600*l*. The agreement was for a period of twenty years with a right to extend it for a further ten years, and in fact it was from time to time extended till a new agreement was made for the same service in February, 1924. In the year 1886 the defendants were minded to work the coal in the Arley Seam lying under or near the Ridgway land. The freeholder of the Ridgway coal was Mr. Roger Leigh, and the lease which he had granted to Ridgway expired in 1885, as appears from the recitals to an agreement dated July 31, 1886, made between Ridgways and the defendants. From that agreement it also appears that Ridgways had to remove the pumping plant from the land within twelve months of the expiration of their lease. The defendants, however, would have to deal with the water in the Ridgway area at the King Coal level in order to protect their workings in the Arley Seam and accordingly, as appears from the said agreement, they agreed with Ridgways to buy and continue to work that pumping plant till they were able to draw off the water from the King Coal level to their pumping plant at Aspull. To enable them to do this a tunnel had to be driven from the Ridgway area, through the land owned by Dorning, thence through part of the Scot Lane area, whence it passed again through some of Dorning's land, and finally emerged again on the Scot Lane area. The water would pass through this tunnel and flow to the Scot Lane Pit No. 1 on the Cannel Seam which there adjoined the King Coal Seam owing to the fault, thence it passed down the shaft to the road known as the King Coal water road in the Scot Lane workings and so to the Aspull pumping pit. The agreement between Ridgways and the defendants shows that the latter had an agreement with Mr. Leigh enabling them to construct this tunnel on the yellow land, and by an indenture of even date with the agreement Dorning granted the defendants an easement of waterway through his land for a term of thirty years, expiring in 1916, at a rent of 10*l*. a year. There was never any written agreement as to this tunnel or the water flowing through it with the Scot Lane owners, but there is no question but that they made the whole of the tunnel in question for and at the cost of the defendants, who also paid for its maintenance. This tunnel was referred to throughout as Tunnel 1 (B). So matters continued till June, 1906. In that month the Scot Lane owners gave notice to the defendants that they intended to stop working the King Coal Mine and inquired whether the defendants wished them to keep the tunnel in question open, to do which would have involved keeping an engine winder and furnace man at the pits. The defendants determined not to go to this expense, and to rely on the water finding its own way down the tunnel and thence to the pumping station. They continued to pay the rent reserved to Dorning under the indenture of 1886 until June, 1916, when the term expired and was not renewed. In fact since 1906 no one had ever troubled about the tunnel; nothing had been done by way of repair or maintenance, but water continued to pass down it from the Ridgway area and it must be assumed that it was continuing to do so in 1932 and 1933. On February 8, 1924, a new agreement was made between the defendants and the owners of the Scot Lane area under which the defendants agreed to pump at the Aspull station all the water from their mines and all the water from the Cannel and King Coal Mines of the Scot Lane Company and certain other waters not material to this action for a period of six years and thereafter till either party gave the other twelve months' notice to determine the agreement for a payment of 500*l.* a year. There was also a provision that, if the defendants gave this notice, the Scot Lane Company were entitled to buy the defendants' interest in the pumping plant shaft and surface works so as to enable them to dispose of their water. On June 27, 1930, the defendants gave notice to the Scot Lane Company of their intention to determine this agreement on June 30, 1931, but in fact they continued to pump at Aspull till August 11, 1932, when the station was closed down presumably because the defendants' mines in the neighbourhood were worked out and were being abandoned. The inevitable result was the formation of a large pound of underground water in the neighbourhood of the Aspull pumping shaft which was fed in part by the water which was still flowing down Tunnel 1 (B) and thence down the route above described. It is with regard to this water that the plaintiffs complain. Their case is that, as the water rose, it banked up in the Scot Lane workings, and, when it reached a certain height, it flowed through openings in the area (in particular one or both of the roadways which had been driven through the fault by the Scot Lane Company in connection with their workings) which gave it access ultimately to their mine. They contended that the water in the Scot Lane area was increased in volume by that introduced by artificial means, namely the tunnel, from the Ridgway area, and so their mine was flooded sooner than it otherwise would have been but for the added water. The evidence in this case was very voluminous, and Mr. Shelley for the appellants when opening the appeal suggested that in every one's interest it would be desirable to argue first a question of law based on an assumption most favourable to his case, admitting that, if he was wrong in law on this assumption, he could not succeed in the appeal. To this course Sir Stafford Cripps for the respondents assented, and accordingly the argument proceeded on the following assumption of fact, which was put into writing and assented to by both parties.

The judge found that when pumping ceased Ridgways water was still flowing through Tunnel 1 (B). There is no reason to suppose that it ceased flowing at once. Assume that the water continued to flow for some reasonable time, say a week. It thus contributed to the formation of a corpus of water. The accumulation formed is (*a*) partly on the defendants' land and partly on the green land, or alternatively, (*b*) on the green land. The water that came to the plaintiffs' land could only have come from that corpus of water. Accordingly it came by reason of the overflow of a corpus of water which had been fed by water brought into it by the defendants' own voluntary act from the yellow land.

The voluntary act was the construction of Tunnel 1 (B), which at the time it was constructed was a proper miner-like operation for the purpose of conducting the Ridgway water to the Aspull pumping station and thereby facilitating the winning of the defendants' coal in another and lower mine.

Now, for the purpose of the argument and without deciding the point, the Court is prepared to accept the contention of the appellants that, if a mining lessee in the course of working his mine artificially diverts a flow of water whether in his own or a neighbouring mine by a work constructed solely for that purpose, with the result that the diverted water would, but for a precaution taken by the lessee, e.g., pumping, find its way into a neighbour's mine, and, if the precaution is afterwards abandoned so that the water does invade the neighbour's mine, he is liable. This, in our opinion, is the highest that the proposition can be put, and in accepting it for the sake of the argument we express no opinion as to whether it makes any difference if it be found that the artificial work or diversion was or was not a proper miner-like operation.

But the point we have to decide is whether, taking this assumption in conjunction with the history of the case above set out, it can be said that the defendants have been bringing, and continuing to bring at the relevant times (that is from August, 1932, to August, 1933, when the flooding took place), relevant water into the plaintiffs' mine. By relevant water is meant water which caused the flooding. In our opinion it cannot. The defendants committed no wrong towards any one in making the tunnel, nor in bringing the water on to the Scot Lane workings during the period they had control of the tunnel. They had no interest in or right to interfere with the tunnel after 1916. The owners of the Scot Lane Mines raised no objection to the water being brought on to their area after 1916. Both before and after that year they took care of the water, if one may use that expression, by arranging with the defendants to pump it for them. But when the agreement of 1924 expired the defendants were under no duty to the Scot Lane Company or to any one else to pump any water that might be in the Scot Lane workings. It is true that the water accumulated at the sump of the Aspull pit, which was on the defendants' land; but it was from the Scot Lane area that it flowed to the sump and it was from the Scot Lane area that it escaped to the plaintiffs' mine. It is also true that on the assumed facts

C. A.
1939
WEST-HOUGHTON COAL AND CANNEL CO. v. WIGAN COAL CORPORATION.

the presence of Ridgways water in the plaintiffs' mine was, as a matter of history, due to the construction of the Tunnel 1 (B). But at no time when the defendants had control of the tunnel did any Ridgways water reach the plaintiffs' mine. At the relevant time, namely, the period following the cessation of pumping in August, 1932, Ridgways water was flowing through the tunnel to the Scott Lane workings; but for this flow the defendants, who had ceased to possess any right in respect of the tunnel some sixteen years before, cannot be held to be responsible. The tunnel was not on their land, they had no power to stop the flow of water in it, and we are unable to see how on any view it can be said that at the relevant time they were causing or permitting this water to flow into the plaintiffs' mine. Nor can it make any difference if it be assumed that on its way to the Scot Lane Mine the Ridgways water which contributed to the flooding passed through part of the defendants' mine at or near the Aspull pumping station. Upon the facts the defendants were not at this time responsible for the presence of Ridgways water in their mine—it came to them from another area, namely Ridgways, by a route over which they had no control whatever; they were perfectly entitted to let it flow through their mine into the Scot Lane Mine, and were not bound to do anything to stop it reaching the plaintiffs' workings via the Scot Lane Mine. Accordingly, if the plaintiffs have a remedy against any one, it is not against the defendants.

In thus disposing of the appeal we are deciding the case on grounds different to those upon which the learned Lord Justice dealt with it, but as we agree with him in the result it is unnecessary for us to deal with the points upon which he founded his judgment.

Appeal dismissed.
Leave to appeal to the House of Lords granted.

Solicitors: *W. P. Ellen, for Peace & Darlington, Liverpool; Gregory, Rowcliffe & Co., for Grundy, Kershaw, Farrar & Co., Manchester.*

H. C. G.

In re COLIN COOPER.

C. A.

1939

July 6.

LE NEVE-FOSTER *v.* NATIONAL PROVINCIAL BANK AND OTHERS.

[1938. C. 3958.]

Will—Legacy—Secret trust—Sum given on valid trusts communicated to the trustees—Additional sum given on secret trusts by later testamentary disposition—No communication by testator to trustees—Invalidity of later gift.

A testator by his will gave 5000*l.* by way of secret trust to trustees to whom he communicated the trusts before he had executed the will. These trusts were acquiesced in by the trustees. By a later testamentary document the testator purported to cancel the earlier will except for certain bequests, and then added: " The sum of 5000*l.* bequeathed to my trustees in " the will now cancelled is to be increased to 10,000*l.*, they " knowing my wishes regarding that sum." The increased bequest was never communicated to the trustees by the testator in his lifetime:—

Held, that the gift of an additional 5000*l.* failed.

The principle laid down in *Blackwell* v. *Blackwell* [1929] A. C. 318 applied.

Decision of Crossman J. (ante p. 580) affirmed.

APPEAL from the decision of Crossman J. (ante p. 580).

By a will dated July 13, 1931, Colin Cooper (hereinafter called " the testator ") appointed the plaintiff and the defendants F. Wilson and Charles V. Troughton executors and trustees thereof. By this will he settled his real and personal estate generally on the usual trusts for his wife and children. In 1938 the testator made a second will dated February 10, 1938, and thereby appointed the plaintiff and the defendants F. Wilson and the National Provincial Bank executors and trustees thereof, and revoked his previous will. This will contained in clause 6 the following bequest: " I bequeath to "the said Fermian Le Neve-Foster [the plaintiff] and Frank "Wilson [defendant] the sum of five thousand pounds free of "duty upon trusts which I have already communicated to "them with respect thereto."

With regard to the bequest contained in clause 6 of this

C. A.
1939
COLIN COOPER, *In re.*
LE NEVE-FOSTER *v.* NATIONAL PROVINCIAL BANK.

will, the evidence adduced at the hearing was to the effect that the testator had, before executing the will, verbally communicated his wishes regarding these trusts to the defendant Wilson and one of the attesting witnesses to the will as representing the plaintiff, who was at the time abroad but to whom these trusts were communicated by this witness immediately on the plaintiff's return. According to a memorandum made at the time by the attesting witness the trusts so communicated were to the effect that the sum of 5000*l.* mentioned in clause 6 was to be held by the defendant Wilson and the plaintiff as to the income thereof for the benefit of the last-named defendant to the summons for life and upon death the capital of the settled fund was to fall into the testator's residuary estate.

Shortly after the execution of this will the testator went to Africa, and while on a big game shooting expedition he contracted a serious illness, and died on March 29, 1938. Two days before his death the testator made and signed the following testamentary disposition: "This is my last will and cancels the "will I made about February 8 or 9, 1938, before leaving England "and puts back in its complete form the previous will, with the "exception that my executors will be Fermian Foster and the "National Provincial Bank and my bequests to Stapleton "and Mann [his stud groom and head gardener] hold good. "The sum of 5000*l.* bequeathed to my trustees in the will "now cancelled is to be increased to 10,000*l.* they knowing my "wishes regarding this sum."

Later on the same day the testator signed a further document giving a direction as to the person to hold his investments.

After the testator's death proceedings took place in the Probate Division, and as a result, on June 2, 1938, the will dated July 13, 1931, that of February 10, 1938, and the two documents executed on March 27, 1938, were admitted to probate as representing the testator's will and all treated as the document in which the testator's last will was contained.

Both the plaintiff and the defendant Wilson denied by affidavits that the increase in the legacy of 5000*l.* to 10,000*l.*

C. A.
1939
COLIN COOPER,
In re.
LE NEVE-FOSTER
v.
NATIONAL PROVINCIAL BANK.

was ever communicated to them by the testator in his lifetime.

In these circumstances an originating summons dated November 19, 1938, was taken out by the plaintiff asking among other questions the following question: "As to "the increased legacy of 10,000*l.* bequeathed by the will "dated March 27, 1938, (*a*) whether the same is bequeathed "to the plaintiff and the defendant Frank Wilson as trustees, "or, if not, to what persons is the same bequeathed as trustees, "and (*b*) whether the same is effectually bequeathed as to the "said sum of 10,000*l.* or some and what part thereof or whether "the same fails in whole or in part."

Crossman J. said it was admitted that the gift of 5000*l.* made by the will of February 10, 1938, had been excepted from the cancelling of that will and remained as if it were incorporated in the will of 1931; and it was not disputed that that gift of 5000*l.* was an effective gift, because the trusts on which it was to be held by the trustees to whom it was bequeathed were communicated to the legatees in the lifetime of the testator before the execution of the will. These were therefore good trusts which could be enforced. The question was whether the gift of the additional 5000*l.* was valid. *Blackwell* v. *Blackwell* (1) laid down that communication of the purpose for which a legacy was given to a legatee and acquiescence by the legatee in that purpose or a promise on his part to carry it out were essential matters which rendered a legacy given on a so-called secret trust valid. That applied to a legacy expressly given on trust as to a legacy given without any disclosure of a trust. He must treat the gift in the document of March 27, 1938, as giving an additional 5000*l.*; but the trusts of this second sum of 5000*l.* had never been accepted by the trustees either impliedly or expressly. The result was that while the gift of the first 5000*l.* remained good the gift of the second sum of 5000*l.* failed.

The last-named defendant appealed. The appeal was heard on July 6, 1939.

H. B. Vaisey K.C. and *Roger Turnbull* for the appellant. There

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(1) [1929] A. C. 318.

C. A.
1939
COLIN COOPER, *In re.*
LE NEVE-FOSTER *v.* NATIONAL PROVINCIAL BANK.

is no dispute that the gift of 5000*l.* is good, but it is said that the substituted legacy of 10,000*l.* can be cut into two parts, of which one 5000*l.* was good and the other bad. The gift is good for the whole 10,000*l.* Crossman J. seems to have thought that, as the trustees have assented to and agreed to administer 5000*l.*, they could not be compelled to administer 10,000*l.* on the same trusts; but it was not a vital thing that the amount of the legacy should be specified to the trustees. Is the problem merely what the trustees agreed to do, to administer a legacy of 5000*l.* or to administer an unspecified sum to be given to them?

[GODDARD L.J. Might not trustees who agreed to administer a legacy of 5000*l.* have said, when the legacy was increased to 90,000*l.* so that the wife and family were deprived of all benefit, that they would never have agreed to administer such a legacy on the secret trusts?]

The difference might then be so big that the trusts would not apply. It is suggested that the trusts here are ascertainable and therefore must apply to the whole 10,000*l.*, which is given out of a very large estate. The principal authority on the subject is *Blackwell* v. *Blackwell.* (1)

[GODDARD L.J. In the present case the trustees did not agree to hold any sum bequeathed to them on the trust, but the sum referred to in clause 6 of the testator's draft will which he was about to sign.]

Their promise holds good equally as regards the 10,000*l.* legacy, which the testator makes clear is to be held on the trusts they know of. A trust which according to the will of the testator is to be found in a certain paper is valid: *In re White. Knight* v. *Briggs.* (2)

[SIR WILFRID GREENE M.R. referred to Theobald on Wills, 8th ed., pp. 81 to 84, and said the passage there showed that a document could only be incorporated in a will if sufficiently referred to in the will to identify it.]

There is no real reason for not recognizing the validity of the trust here for the whole sum of 10,000*l.*

(1) [1929] A. C. 318.

(2) [1925] Ch. 179.

J. V. Nesbitt for the testator's widow and the two infant children was not called upon.

Wilfrid Hunt for the plaintiff.

Bernard F. Mendel for the defendant Wilson.

SIR WILFRID GREENE M.R. In this case it is not possible to give effect to what the testator obviously desired, because he has not taken the steps which the law requires to enable that desire to become effective. He was minded to make a disposition by means of what is commonly called a secret trust, as he was not disposed to set out upon the face of his will or upon the face of some identifiable document described in his will the dispositions which he desired to make; accordingly he adopted the familiar device of bequeathing a legacy in favour of named persons which they were to hold as trustees, but the actual trusts upon which they were to hold it had been communicated by him to them and accepted by them in his lifetime. In order that a disposition which it is desired to make by that process can be effective it is necessary (1) that the intention of the testator be communicated to the trustees, that the trustees accept the instructions of the testator, and that acting on the faith of that acceptance, he makes the gift or, if it is a gift which has been already made, leaves it unrevoked. It would be better if, instead of using the language of my own which I have just used, I were to take three short passages from the speeches delivered in the House of Lords in the case of *Blackwell* v. *Blackwell*. (1) First of all, Lord Buckmaster says this (2): "It is, I think, more "accurate to say that a testator having been induced to make "a gift on trust in his will in reliance on the clear promise by "the trustee that such trust will be executed in favour of "certain named persons, the trustee is not at liberty to "suppress the evidence of the trust and thus destroy the whole "object of its creation, in fraud of the beneficiaries." Lord Sumner says (3): "The necessary elements, on which the "question turns, are intention, communication, and

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(1) [1929] A. C. 318.
(2) Ibid. 329.
(3) Ibid. 334.

C. A.
1939
COLIN COOPER, *In re.*
LE NEVE-FOSTER *v.* NATIONAL PROVINCIAL BANK.
Sir Wilfrid Greene M.R.

"acquiescence. The testator intends his absolute gift to be "employed as he and not as the donee desires; he tells the "proposed donee of this intention and, either by express "promise or by the tacit promise, which is signified by "acquiescence, the proposed donee encourages him to bequeath "the money in the faith that his intentions will be carried "out." Lord Warrington says (1): "It has long been "settled that if a gift be made to a person or persons in terms "absolutely but in fact upon a trust communicated to the "legatee and accepted by him, the legatee would be bound to "give effect to the trust, on the principle that the gift may "be presumed to have been made on the faith of his acceptance "of the trust, and a refusal after the death of the testator "to give effect to it would be a fraud on the part of the "legatee. Of course in these cases the trust is proved by "parol evidence, and such evidence is clearly admissible." I may say with regard to the presence of the word "absolutely" in that paragraph that the noble and learned Lord was there referring to the class of case where on the face of the will the gift is absolute; but one of the matters decided in *Blackwell* v. *Blackwell* (1) was that similar principles apply where the gift on the face of the will is a trust gift. Therefore, if a testator is minded to make use of the machinery of a secret trust, those elements must be present which are referred to in the extracts which I have read, communication to the trustees, acceptance by the trustees and the execution of the will or the codicil in reliance upon that acceptance.

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In the present case there is no question that when the testator made his will of February 10, 1938, the legacy of 5000*l.* thereby bequeathed to the two named trustees was effectively given and the giving of it complied with the requirements of a secret trust; the terms had been communicated, the trustees had acquiesced and the testator made his will upon the faith of that acquiescence. But the only trust which was in the picture on that occasion was one which related to a defined and stated sum of 5000*l.* That was the legacy the intention to bequeath which was

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(1) [1929] A. C. 318, 341.

C. A.
1939
COLIN COOPER, *In re.*
LE NEVE-FOSTER
v.
NATIONAL PROVINCIAL BANK.

Sir Wilfrid Greene M.R.

communicated to the trustees; that was the legacy in respect of which they gave their acceptance; that was the legacy which the testator, induced by that acceptance, in fact bequeathed. At a later date when, after an unfortunate sudden illness which proved fatal in South Africa, the testator made a will on March 27, 1938, he had no communication with those trustees with regard to the dispositions which he thereby made; there was no acquiescence by the trustees in the dispositions in question: he made that will not induced by any such acquiescence by the trustees although he made it quite clearly in the belief that what he was doing would be effective and that his trustees would carry it out; but none of the necessary elements to constitute a valid secret trust were present on the occasion of the making of that will. The actual form of that will was a cancellation of the will of February, 1938, and the reinstatement of an earlier will. He then goes on to say: "The sum of 5000*l.* bequeathed "to my trustees in the will now cancelled is to be increased to "10,000*l.* they knowing my wishes regarding this sum." The learned judge construed the testamentary instructions of the testator by saying that the original gift of 5000*l.* was not revoked by this will and that in substance the effect of this will was to leave that gift in the earlier will unrevoked and to add to it a further 5000*l.* Speaking for myself, I do not think that any difference in principle emerges based on a distinction between the revocation of the original legacy and the bequest of a new legacy of larger amount, and the leaving of the original legacy unrevoked and the addition to it of a further sum. It does not seem to me possible to say that anything can turn on so fine a point. The substance of the matter is that, having imposed on the conscience of these two trustees the trust in relation to the legacy of 5000*l.* and having written that legacy into his will of February, 1938, by this will he in effect is giving another legacy of the same amount to be held upon the same trusts. It seems to me that upon the facts of this case it is impossible to say that the acceptance by the trustees of the onus of trusteeship in relation to the first and earlier legacy is something which must be treated as having been

C. A.
1939
COLIN COOPER, *In re.*
LE NEVE-FOSTER *v.* NATIONAL PROVINCIAL BANK.
Sir Wilfrid Greene M.R.

repeated in reference to the second legacy or the increased legacy, whichever way one chooses to describe it. In order that a secret trust might be made effective with regard to that added sum in my opinion precisely the same factors were necessary as were required to validate the original trusts, namely, communication, acceptance or acquiescence, and the making of the will on the faith of such acceptance or acquiescence. None of these elements, as I have said, were present. It is not possible, in my opinion, to treat the figure of 5000*l.* in relation to which the consent of the trustees was originally obtained as something of no essential importance. I cannot myself see that the arrangement between the testator and the trustees can be construed as though it had meant "5000*l.* or whatever sum I may hereafter choose to bequeath." That is not what was said and it was not with regard to any sum other than the 5000*l.* that the consciences of the trustees (to use a technical phrase) were burdened. It must not be thought from what I have been saying that some trifling excess of the sum actually bequeathed over the figure mentioned in the first bequest to the trustees would necessarily not be caught. Such an addition might come within the rule of de minimis if the facts justified it. Similarly it must not be thought that, if a testator, having declared to his trustees trusts in relation to a specified sum, afterwards in his will inserts a lesser sum, that lesser sum would not be caught by the trusts. In such a case the greater would I apprehend be held to include the less. In the present case neither of these two possible methods of dealing with the difficulty is available, because here we have something to which the rule of de minimis could not possibly apply, for it is an increase and a very substantial increase of the legacy originally bequeathed. There is no ground, in my opinion, which would justify the Court in treating the reference to that specific sum which passed between the testator and the trustees as having a significance of so loose and indeterminate a character that it could be expanded at will.

That really disposes of this appeal. I should, however, just mention one argument that Mr. Vaisey submitted to us—namely, that on the facts of this case we should construe the provision in question as incorporating by reference into the testamentary dispositions of the testator the trusts actually declared to his trustees. The answer to that argument is a short one. Although it is true that Mr. Swan for his own convenience committed to writing the trusts which had been verbally declared, there is no mention on the face of the will of March, 1938, of that document or of any document at all. Accordingly there is no question here of incorporating by reference into a will the terms of some existing document described sufficiently and identified in the will itself.

The result is that the judgment of Crossman J., in my opinion, was perfectly right and the appeal must be dismissed.

CLAUSON L.J. I agree. Crossman J. asked himself, as it appears to me, the relevant and the crucial question as to whether he could on the evidence arrive at the conclusion that the trustees ever accepted a trust, either impliedly or expressly, with regard to the second 5000*l.* He came to the conclusion that the evidence did not show that they had ever accepted such a trust, and I cannot see my way to differ from him. For those reasons I agree that the appeal must be dismissed.

GODDARD L.J. I agree, and I have nothing to add.

Appeal dismissed.

Solicitors: *Elvy Robb & Co.*; *Warren, Murton, Foster & Swan.*

H. C. G.

C. A.

1939

May 4, 5, 25.

In re MARSLAND.

LLOYDS BANK, LIMITED *v.* MARSLAND.

[1938. M. 248.]

Deed of separation—Covenant by husband not to revoke certain provisions in his will—Death of wife—Remarriage of husband—Revocation of will—Construction of covenant—Wills Act, 1837 (7 *Will.* 4 & 1 *Vict. c.* 26), *ss.* 18, 20.

On May 30, 1902, the testator and his first wife entered into a deed of separation. Immediately before the execution of the deed he had made a will whereby he left a moiety of his estate for the benefit of his wife and children. In the deed he covenanted that he would "not revoke the before mentioned will or alter "the same so far as regards the gift of the half share of his estate "to his wife and children as aforesaid." The testator's first wife died on November 14, 1908. In 1935 he remarried, thereby revoking his will under s. 18 of the Wills Act, 1837:—

Held, that the covenant by the testator not to revoke his will was, on its true construction, confined to acts of revocation performed as such under s. 20 of the Wills Act, 1837, and did not extend to revocation imposed by s. 18, whether the testator wished it or not.

Decision of Farwell J. affirmed.

Appeal from Farwell J.

On May 30, 1902, the testator, Fred Marsland, and his first wife entered into a deed of separation. At that date the two children of the marriage, the respondent, Bertram Marsland, and the appellant, Mrs. Grace Mavis Gutteridge, were aged respectively twelve and seven years. Immediately before the execution of the deed the testator had made a will whereby he bequeathed two-thirds of one moiety of his residuary trust funds upon trust to pay the income thereof to his wife for life, and after her decease, as to two-thirds of such two-thirds for his son Bertram, and as to the remaining one-third of such two-thirds to his daughter, Grace Mavis. The remaining one-third of such moiety was given as to two-thirds to Bertram, and as to one-third to Grace Mavis, to be paid to them on Bertram attaining the age of twenty-four years, the income thereof in the meantime to be equally applied for their maintenance.

The separation deed recited the pendency of a suit for judicial separation at the instance of the wife, the ages of the children, and the execution of the will and its provisions, as above stated. The operative part of the deed contained provisions of the usual kind, including a covenant by the testator to pay to his wife during their joint lives, if they should so long live apart, an annual sum of 400*l.*, rising to 700*l.* It also contained the following covenant: "That the "said Fred Marsland shall and will not revoke the before "mentioned will or alter the same so far as regards the gift "of the half share of his estate to his wife and children as "aforesaid." The testator's first wife died on November 14, 1908, and in 1935 he married the respondent, Mrs. Clara Louise Marsland. By this marriage the will referred to in the separation deed was revoked under s. 18 of the Wills Act, 1837.

On February 19, 1935, the testator made his last will, by which he bequeathed to his wife personal chattels and a legacy of 2000*l.*, and, subject to a provision in favour of his sister, a life interest in his residuary estate. Subject to these provisions, he left half his residuary estate to his son Bertram absolutely, and the remaining half on trusts for the benefit of his daughter and her issue, with an ultimate gift to Bertram. There were no issue of the second marriage. The testator died on May 28, 1936.

A summons was issued raising various questions, and Farwell J. held that, assuming that the covenant in the deed, on its true construction, was broken by the second marriage of the testator, it was void as being against public policy, inasmuch as it was, in effect, a covenant not to revoke a will by subsequent marriage.

Mrs. Gutteridge appealed. The appeal was heard on May 4, 5, 1939.

Leonard Stone for appellant. There is a vital distinction between a covenant not to marry by a person who has never been married and a covenant by one who is or has been married. In *Robinson* v. *Ommanney* (1) the covenantor was

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(1) (1882) 21 Ch. D. 780; (1883) 23 Ch. D. 285.

C. A.

1939

MARSLAND, *In re.* LLOYDS BANK, LD. *v.* MARSLAND.

unmarried. Sheppard's Touchstone (1) was referred to in the argument in the Court below. (2) Before the Wills Act, 1837, a covenant not to revoke a will was good. The difficulty arises from s. 18 of that Act. *Allen* v. *Jackson* (3) dealt directly with the difference between such a covenant by a married and an unmarried person. Originally, in the case of a covenant not to revoke a will, a breach of the covenant gave rise to an action for damages. Then came the Wills Act, 1837, whereby marriage was made an act which revoked a will. Therefore, it being the policy of the law that a general restraint of marriage was against public policy, the question arose whether a covenant not to revoke a will was void. *Robinson* v. *Ommanney* (4) got over the difficulty by holding that the covenant was divisible. There is nothing against public policy in restraining a married person from a second marriage, so we are back to the position before the Wills Act. Such a covenant is wholly good, and it cannot be impeached on the ground that it is against public policy. This covenant could have been enforced by an action for damages on breach of the covenant. The covenant here is not only not to revoke the will, but also not to alter it. Therefore the testator has committed two breaches: first, by marriage, and secondly, by making a new will.

L. M. Jopling for testator's widow.

H. L. A. Hart for Bertram Marsland. The covenant not to revoke the will could not give rise to an action for damages. The covenant in restraint of marriage is not in accordance with public policy. The same applies to agreements inter vivos. The point is an artificial one and is only a question of drafting, since a gift " till marriage " is not void. *Allen* v. *Jackson* (5) does not lay down a general rule which could affect the question: see also *Baker* v. *White.* (6) There is no difference where a covenantor who has bound himself not to remarry has been married before. A wager not to marry for six years is void: *Hartley* v. *Rice.* (7) A gift to a widow or

(1) Vol. II., p. 401.

(2) 21 Ch. D. 782.

(3) (1875) 1 Ch. D. 399.

(4) 23 Ch. D. 285.

(5) 1 Ch. D. 399, 404, 406.

(6) (1690) 2 Vern. 215.

(7) (1808) 10 East, 22.

C. A.
1939
MARSLAND, *In re.*
LLOYDS BANK, LD.
v.
MARSLAND.

widower till remarriage leaves them free to remarry and forgo the legacy. They are under no obligation not to remarry. In *Lowe* v. *Peers* (1) there is a reference to *Baker* v. *White.* (2) It is also referred to in *Woodhouse* v. *Shepley* (3) and *Newton* v. *Marsden.* (4) *Lowe* v. *Peers* (1) is referred to in *In re Lanyon.* (5) Lord Wright deals at some length with the modern law as regards public policy in *Fender* v. *St. John-Mildmay.* (6) A contract against a second marriage is just as much contrary to public policy as a contract against a first. It is difficult to imagine that in a separation deed one party should wish to preclude the other party from ever marrying again. [He also referred to *Key* v. *Bradshaw.* (7)]

P. A. Ferns for infant defendants. It is in the interests of the infant defendants to maintain the validity of the new will.

H. O. Danckwerts for the trustees.

Leonard Stone. The rule of construction is the same in the case of a will and a deed: *In re Hewett.* (8)

Cur. adv. vult.

1939. May 25. SIR WILFRID GREENE M.R. The judgment which I am about to read is the judgment of the Court (SIR WILFRID GREENE M.R., FINLAY and LUXMOORE L.JJ.).

On May 30, 1902, the late Mr. Fred Marsland (whom we will call "the testator") and his first wife entered into a deed of separation. At that date the two children of the marriage, the respondent Mr. Bertram Marsland and the appellant Mrs. Grace Mavis Gutteridge, were aged respectively twelve and seven years. Immediately before the execution of the deed the testator had made a will whereby he had bequeathed two-thirds of one moiety of his residuary trust funds upon trust to pay the income thereof to his wife for life and after her decease as to two-thirds of such two-thirds for his son Bertram and as to the remaining one-third of such two-thirds to his daughter Grace Mavis. The remaining one-third of the said moiety was given as to two-thirds to Bertram and as to

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(1) (1768) 4 Burr. 2225, 2229–30.
(2) 2 Vern. 215.
(3) (1742) 2 Atk. 535, 540.
(4) (1862) 2 J. & H. 356, 564.
(5) [1927] 2 Ch. 264, 273.
(6) [1938] A. C. 1, 38–39.
(7) (1689) 2 Vern. 102.
(8) [1918] 1 Ch. 458.

C. A.
1939
MARSLAND, *In re.* LLOYDS BANK, LD. *v.* MARSLAND.

one-third to Grace Mavis to be paid to them on Bertram attaining the age of twenty-four years, the income thereof in the meantime to be equally applied for their maintenance.

The separation deed recited the pendency of a suit for judicial separation at the instance of the wife, the ages of the children and the execution of the will and its provisions as above stated (with some inaccuracies not relevant for present purposes). The operative part of the deed contained provisions of the usual kind, including a covenant by the testator to pay to his wife during their joint lives if they should so long live apart an annual sum of 400*l.* rising to 700*l.* It also contained a covenant by the testator which has given rise to the present controversy. That covenant is in the following terms: "And "also that the said Fred Marsland shall and will not revoke "the before mentioned will or alter the same so far as regards "the gift of the half share of his estate to his wife and children "as aforesaid."

The only other provision of the deed which need be mentioned is the final clause, under which the terms contained in the deed were to become null and void if the wife should thereafter apply for and obtain a judicial separation.

The first wife of the testator died on November 14, 1908, and on a date not specified but before February 19, 1935, the testator married the respondent, Mrs. Clara Louise Marsland. By this marriage the will referred to in the separation deed was revoked (Wills Act, 1837, s. 18).

On February 19, 1935, the testator made his last will appointing the respondents Lloyds Bank, Ld., executor and trustee. He bequeathed to his wife personal chattels and a legacy of 2000*l.* and, subject to a provision in favour of his sister, a life interest in his residuary estate. Subject to these provisions, he left one-half of his residuary estate to his son Bertram absolutely and the remaining half to his daughter Mrs. Gutteridge for life and after her death to her issue as she should appoint and in default of appointment to her children attaining twenty-one or (in the case of daughters) marrying, with an ultimate gift to his son Bertram. Clause 12 of the will was to the following effect: "If either of them my said

C. A.
1939
MARSLAND,
In re.
LLOYDS
BANK, LD.
v.
MARSLAND.

"son and daughter shall refuse to accept the provisions herein-"before contained as the final settlement of my estate or shall "claim to be entitled to any larger share or interest in my "estate than is given to him or her by the foregoing provisions "then I direct the Bank to stand possessed of one half of my "net estate (including therein the effects and money mentioned "in clause 4 hereof) upon trust for my said wife absolutely "and I direct that in that event the preceding clauses of this "my will shall be deemed to be varied so far as necessary to "give effect to this provision."

There were no children of the second marriage of the testator. The appellant Mrs. Gutteridge has one child, the infant respondent Ann Austina Gutteridge.

In these circumstances questions have arisen as to the rights (if any) of the children of the testator under the separation deed, the effect (if any) on those rights of the revocation of the earlier will of the testator by his second marriage, and the effect of clause 12 of the later will and its bearing on any claim which the children of the testator or either of them may make upon the basis of the separation deed. These questions so far as relevant may be thus summarized: (1.) Did the separation deed confer any right upon the children to complain of a breach by the testator of his covenant not to revoke or alter the earlier will? (2.) Did the testator commit a breach of that covenant by marrying again? (3.) If on the true construction of the covenant in the separation deed the second marriage did amount to a breach of it, is the covenant void as being against public policy in so far as it imports an undertaking by the testator not to marry a second time? (4.) What in view of clause 12 of the later will would be the position of the children if they or one of them were to make a claim (whether successful or not) based on the separation deed?

Of these questions the only one dealt with by Farwell J. against whose decision Mrs. Gutteridge appeals was the third. Upon that question, holding or assuming that the covenant on its true construction was broken by the second marriage of the testator, he considered that inasmuch as it was in effect

C. A.
1939
MARSLAND, *In re.*
LLOYDS BANK, LD.
v.
MARSLAND.

a covenant not to revoke the will by subsequent marriage, it was void as being against public policy. ✓

The first question is whether the children can claim at all under the separation deed in view of the fact that they were not parties to it. This question was not fully argued before us as it appeared to us that it could not properly be dealt with on an originating summons. It is therefore unnecessary for us to say anything more about it. The second question, however, is a true question of construction and was fully argued before us, although it does not appear that it was argued before Farwell J. In our opinion the covenant by the testator not to revoke or alter the earlier will does not amount to a covenant by him not to marry again. The covenant must be construed with reference to the sections of the Wills Act, 1837, which describe the ways in which a will may be revoked. Sect. 20 states exhaustively the ways by which the testator by his own act can revoke a will—i.e., by another will or codicil or by destruction animo revocandi. In these cases the action of the testator is directed to revocation of his will and that alone, and revocation takes place as the intended consequence of his action. Sect. 18 provides that a will shall be revoked by marriage. Here revocation takes place not by virtue of some action of the testator directed to the revocation of the will, but as a collateral consequence, imposed by law, of an action performed alio intuitu. In our opinion, when the testator here covenanted not to "revoke" his will, his words are to be confined to acts of revocation performed as such and for that purpose, scilicet to revocation under s. 20, and do not extend to the case under s. 18 where revocation follows as a matter of law whether the testator wishes it or not. This view, if we may say so, appears to have the merit of being in accordance with the probabilities of the case. It seems highly unlikely that the parties can have intended under cover of such a covenant to impose a tacit restriction on remarriage.

There is, so far as we have been able to ascertain, no precise authority with regard to the meaning of a covenant not to revoke, but we see no difference in principle between a covenant not to revoke and a covenant not to assign. In the latter case, if the covenant is simply against assignment, the Courts have always construed this as prohibiting actual assignment and not as including any assignment by operation of law: see *Doe* v. *Bevan*. (1)

Nothing that was said in the case of *Robinson* v. *Ommanney* (2) is inconsistent with the view which we have expressed. In that case the covenant was that the covenantor would not "do or commit any act, deed, matter, or thing by "means whereof the said will so to be made by her should be "revoked, annulled, cancelled, or affected in any manner "howsoever." This covenant would clearly have been broken if the covenantor had married.

Having regard to the view which we have formed upon the second question, the third question does not arise and we find it unnecessary to express any opinion upon it. The fourth question as to the effect of clause 12 of the later will has no practical importance in view of our decision upon the second question and we accordingly do not deal with it.

The appeal is dismissed.

Appeal dismissed.

Solicitors: *Marchant, Newington & Dommett, for J. A. K. Ferns, Stockport; Gregory, Rowcliffe & Co., for Ramsden, Sykes & Ramsden, Huddersfield.*

(1) (1815) 3 M. & S. 353.
(2) (1882) 21 Ch. D. 780; (1883) 23 Ch. D. 285.

P. J. B.

C. A.

1939

June 29, 30.

In re LANDI (DECEASED).

GIORGI *v.* NAVANI.

[1936. L. 962.]

Land—Held by two persons as tenants in common—Adverse possession by one—Co-trustees upon the statutory trusts for sale from January 1, 1926*—Fiduciary relationship—Statutes of Limitations not applicable from that date*—4 *&* 5 *Anne, c.* 3*—Real Property Limitation Act,* 1833 (3 *&* 4 *Will.* 4, *c.* 27), *s.* 12*—Law of Property Act,* 1922 (12 *&* 13 *Geo.* 5, *c.* 16), *s.* 10*—Law of Property* (*Amendment*) *Act,* 1924 (15 *Geo.* 5, *c.* 5), *s.* 10, *Sch.* X.*—Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *ss.* 12, 35, 205.

The testator and one Fantoni purchased certain leasehold premises in their joint names in 1915. From that date until the end of 1923 they were in joint possession of the premises. From the end of 1923 until his death in May, 1935, the testator was in sole possession of the premises, taking all the rents and profits and keeping them for his own benefit, without rendering any accounts to Fantoni. Fantoni died later, and his widow, acting as his legal personal representative, claimed to be entitled to half the rents and profits from the end of 1923 until the death of the testator:—

Held, affirming the decision of Simonds J., that with respect to the rents and profits accrued due from the end of 1923 until January 1, 1926, the claim was barred under the Statutes of Limitations.

Held, reversing the decision of Simonds J., that the testator and Fantoni became on January 1, 1926, under the provisions of the Law of Property Act, 1925, trustees upon the statutory trusts for sale, that a fiduciary relationship was then established between them, and the Statutes of Limitations no longer applied, and that the claim to the rents and profits accrued due from that date until the death of the testator should be allowed.

APPEAL from a decision of Simonds J.

This was a claim put forward by the appellant, Eleanora Fantoni, in the course of administration of the estate of Egisto Landi, who died on May 14, 1935. The estate was being administered by the Court in a beneficiaries' administration action. The appellant claimed, as legal personal representative of her deceased husband, Salvatore Fantoni, to be a creditor of the estate of Landi, the testator, in respect of a half-share of the rents and profits of a leasehold property, known as 155 Whitechapel Road, from July, 1923, to the date of the death of the testator.

In 1915 the premises in question were bought in equal shares by the testator and Fantoni and their interests were those of tenants in common. From that date until July, 1923, the testator, who was a son-in-law of Salvatore Fantoni, and the Fantonis occupied the premises jointly. In July, 1923, that occupation ceased, and from that date until his death the testator received the rents and profits of the estate. He managed the property exclusively and treated the rents and profits as his own, making no payments to Fantoni. He did, however, leave a memorandum in which he stated he had bought the property together with Fantoni, and, according to the evidence of the appellant, he stated verbally that Fantoni would, in due course, receive his share of the rents and profits. By his will the testator bequeathed his interest in the property to Fantoni and the claimant.

On those facts Simonds J. held that the applicant had established her claim, but that it was barred by s. 12 of the Real Property Limitation Act, 1833. The applicant appealed. The appeal was heard on June 29, 30, 1939.

Milner Holland for the appellant. There is no appeal here against the decision of Simonds J. in favour of the appellant on the facts, but only against his decision that her claim was barred by s. 12 of the Act of 1833. Before that section was passed the occupation of property by one co-tenant was regarded as the occupation of both, but under the section, as amended by the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), a co-tenant who is in sole occupation or in sole enjoyment of the rents and profits for twelve years acquires a title by possession to the whole property. Here Mr. Fantoni and the testator, who were tenants in common of the property in question, were both living there till the end of 1923, and the testator died on May 14, 1935. Consequently the full period of twelve years had not then expired, and for this reason alone the appellant's claim is not barred. The power of one joint tenant or tenant in common to bring an

C. A.
1939
LANDI, *In re.*
GIORGI
v.
NAVANI.

action against the other was first conferred by 4 & 5 Anne, c. 3, s. 27: see *Eason* v. *Henderson* (1) and Halsbury's Laws of England, 2nd ed., vol. xxvii., p. 660. Since 1925 that provision has been repealed as no longer necessary, because under the Law of Property Act, 1925, ss. 35 and 36, and Sch. I., Part IV., property belonging to not more than four joint tenants or tenants in common vests in them jointly as trustees upon the statutory trusts. Ever since that Act came into force on January 1, 1926, until the death of the testator, the property was vested in the testator and Fantoni as trustees. That would appear at first sight to destroy any possible application of the Act of 1833, but s. 12 of the 1925 Act provides: "Nothing "in this Part of the Act affects the operation of any statute, "or of the general law for the limitation of actions or pro-"ceedings relating to land." Seemingly then the creation of the statutory trusts has no effect for this purpose.

[SIR WILFRID GREENE M.R. How far is s. 12 of the Act of 1833 relevant? This is not an action to recover land, but a claim to make the estate of one tenant in common account to the other for rents and profits received.]

If the testator had remained in adverse possession for twelve years before his death, Fantoni's half-share of the property would pass and with it the right to rents: see s. 34 of the Act of 1833 and *In re Jolly*. (2) That position is, it is suggested, affected by the Act of 1925, for as from January 1, 1926, the appellant, as legal personal representative of her husband, claims as a beneficiary under the statutory trusts.

In view of the fact that adverse possession had not been continued for the full period of twelve years at the testator's death, it is necessary to consider whether the executors' receipt of the rents of the property could be relied on as a further act of adverse possession. The legal estate in the property passed to Fantoni on the testator's death, and therefore the executors were not collecting the rents as reversioners at all. For the Act of 1833 to apply there must be unequivocal possession for the possessor's own benefit. A possession in a different character cannot be added to an

(1) (1848) 12 Q. B. 986.

(2) [1900] 2 Ch. 616.

earlier period of adverse possession to make up the twelve years.

[CLAUSON L.J. The executors seem to have been receiving Fantoni's share of the rents as mere trespassers, and if no action is brought to oust them before the period of adverse possession running at the testator's death has been made up to twelve years, any subsequent action must fail.]

The possession of the executors was not such as to satisfy the statute. Their occupation should be attributed to a rightful title—namely, that of trustees of the will: see *Thomas* v. *Thomas* (1) and *Corea* v. *Appuhamy*. (2)

These difficult questions will not, however, arise, if on the evidence the testator must, as it is contended, be regarded as having received the rents throughout for the benefit of himself and Fantoni. The evidence really makes this clear.

Kennedy v. *De Trafford* (3) establishes that there is no fiduciary relationship between co-tenants.

Sect. 12 of the Act of 1833 does not apply in this case since January 1, 1926; as from that date the testator and Fantoni held the property as trustees upon the "statutory trusts" within the meaning of s. 35 of the Act of 1925.

H. Wynn Parry K.C. and *J. F. Bowyer* for respondents. The words "for his own benefit" in s. 12 of the Act of 1833 refer to the consequences which flow from his receiving the rents, and do not refer to any legal right. The testator always treated the moneys he received as his own. He said he was receiving them for his own account. In the face of *Kennedy* v. *De Trafford* (3) there can be no question of a fiduciary relationship between the parties, and, unless the applicant can prove a fiduciary relationship, the testator held the property for his own benefit. At the time when the writ was issued the right of Fantoni had been extinguished, and his failure to receive his share of the rents makes *In re Jolly* (4) apply. The question of what the testator intended to do with the money at the moment of collecting the rents has no effect on the transaction.

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(1) (1855) 2 K. & J. 79, 83.
(2) [1912] A. C. 230.
(3) [1896] 1 Ch. 762; [1897] A. C. 180.
(4) [1900] 2 Ch. 616.

C. A.
1939
LANDI, *In re.* GIORGI *v.* NAVANI.

Sect. 12 of the Act of 1925 leaves s. 12 of the 1833 Act unaltered, where co-owners are concerned, notwithstanding s. 35, and does not in any way repeal it. The only difficulty is that according to the definition of "land" in s. 205, the definition section, of the Act of 1925, an undivided share in land is not "land." Sect. 12 and the opening words of s. 205 preserve the right of co-owners under s. 12 of the Act of 1833.

The right of Fantoni to any share of the rents and profits has gone, and this appeal must fail.

SIR WILFRID GREENE M.R. This appeal, from a decision of Simonds J., raises for consideration a large number of interesting points, but upon the view which I take of the case it will not be necessary for me to express any concluded opinion upon some of them.

The question arises in this way. At the date of his death on May 14, 1935, Egisto Landi was, as the learned judge found, co-owner with one Mr. Fantoni of certain leasehold premises, No. 155 Whitechapel Road. Their interests were those of tenants in common in equal shares. That matter of fact the learned judge decided in favour of the present claimant, and from that decision there is no appeal. But the learned judge also decided that the claim of the claimant was barred by the Statute of Limitations, that claim being a claim to one moiety of the net rents of the property received by the testator during his life and not accounted for. One curious feature of the case is that, assuming that the title of Mr. Fantoni and his legal personal representative, for he is dead, to his moiety of the land had been extinguished by the Statute of Limitations, by the will of the testator the testator's interest in the property is bequeathed to Mr. Fantoni and his wife. The effect of that might give rise to an interesting question in connection with the application of the Statute of Limitations, for the reason that at the death of the testator the statutory period of limitation, if indeed the Statute of Limitations applied to the facts, was not yet completed and accordingly at that date the title to one moiety on any view remained vested in Mr. Fantoni; but that matter it is not necessary to go into.

The parties had lived in the premises down to the end of 1923, and thereafter they were out of occupation and the rents were received throughout by the testator down to his death, which took place on May 14, 1935. The statutory period of limitation therefore, if it applied, began at the end of 1923 and would not have come to an end until the end of 1935, that is to say, some seven months after the death of the testator.

The learned judge dealt with the question of the Statute of Limitations in this way. The claim, being a claim in respect of a share of rents which had accrued before the end of the twelve years, could only be rejected if the Statute had run against the claimant, and if, moreover, the effect of it so running had been not merely to divest the claimant (who is, as I have said, the legal personal representative of Mr. Fantoni) of title to the undivided moiety, but also to bar the right to recover a share of rents which had accrued before that title was extinguished by the Statute. The learned judge proceeded upon the basis that if extinction of the title was shown to have taken place by virtue of the Statute, that operated to bar the right to a share of rents which accrued before that date. There again whether or not that consequence would follow from the extinction of the title is a question of some nicety. I need say no more about it than this, that the right to recover the share of rents by Mr. Fantoni was originally a right under the Statute of Anne (the relevant section of which was repealed by s. 10 of the Law of Property (Amendment) Act, 1924), and therefore had a special character of its own; but I do not propose to enter into the question whether that proposition is right—namely, that the extinction of the title extinguished the claim to the share of the previous rents. The learned judge, proceeding upon that basis, therefore had to consider the question whether or not the title of Mr. Fantoni and his legal personal representative had been extinguished under the relevant Statute of Limitations. He points out in his judgment that, but for s. 12 of the Real Property

C. A.
1939
LANDI, *In re.*
GIORGI *v.* NAVANI.
Sir Wilfrid Greene M.R.

Limitation Act, 1833, the possession of the testator would have been a possession on behalf of both of the tenants in common, with the result that that possession could not have been relied upon for the purpose of the Statute of Limitations. Sect. 12 deals with that matter, because it provides that when one of several tenants in common (I take only the relevant case) has " been in possession or receipt of the entirety, or more "than his or their undivided share or shares of such land or "of the profits thereof, or of such rent, for his or their own "benefit, or for the benefit of any person or persons other "than the person or persons entitled to the other share or "shares of the same land or rent, such possession or receipt "shall not be deemed to have been the possession or receipt "of or by such last-mentioned person or persons or any of "them." If that be the relevant section and if the matters to which I have already referred are assumed to be decided in a particular way, I agree that a question would arise whether upon the facts of this case the receipt by the testator, Mr. Landi, of the profits and rents which he received was a receipt for his own benefit, and that that question would be the crucial question. The learned judge dealt with it by answering it adversely to the claimant. He held that notwithstanding the fact that during the time he was receiving these rents the testator admitted to his co-joint tenant that he was receiving them on behalf of both and was accordingly liable to account for them, and notwithstanding the fact that in his account-book under a head showing that they were co-owners of the property he entered all his receipts and payments, notwithstanding those facts the learned judge on the true construction of the section, applying it to the facts, held that his receipt was a receipt for his own benefit. I do not find it necessary to examine the reasons for the learned judge's judgment in that respect, but it must not be taken from that that I accept the correctness of his view, because it appears to me that there are very formidable arguments in support of the contrary opinion. That particular problem I do not attempt to solve, because upon the view which I take of this case it does not fall for decision. I only wish

C. A.
1939
LANDI,
In re.
GIORGI
v.
NAVANI.

Sir Wilfrid
Greene M.R.

it not to be taken that, either upon that point or upon any of the other questions which I have mentioned as to which I am not proposing to express my opinion, I am accepting anything that has been said.

The ground upon which I think the case falls to be decided is one with which the learned judge does not deal, since it was not argued before him. The whole position of land held in undivided shares was, of course, entirely altered by the recent property legislation. Before that legislation came into force at midnight on December 31, 1925, tenants in common were each of them entitled to possession, each of them entitled to receive and collect the rents, and each of them had the right given them by the Statute of Anne to call upon the other to account if he had received more than his share. They were the legal owners of the land, but, when midnight of December 31, 1925, arrived, the position was entirely changed; they then acquired a character which they had not acquired before—namely, the character of trustees. The previous relationship of tenants in common, or joint tenants, had nothing in the world to do with trusteeship. It was, of course, possible for tenants in common by appropriate conveyancing methods to introduce the conception of trusteeship into their relationship, but the mere fact that they were tenants in common introduced no fiduciary element at all. Under the Law of Property Act, 1925, that fiduciary element unquestionably came into the picture, and it constitutes a trust under which their obligation as trustees is an obligation to sell the property and divide the proceeds, and in the meantime their possession is the possession of trustees, because it is in that capacity that they hold the legal title. Their receipts of the rent would be in the same capacity—namely, as reversioners holding the reversion expectant on the determination of the lease. Of course, they have another character as well, that of beneficiaries. Each of them is a trustee and each of them is a beneficiary. Nevertheless, as from that midnight, the character in which they, if they act jointly, or one of them, if one acts alone, receive or receives rent, is entirely different from the character in which the same persons or person would have received it before that midnight.

C. A.
1939
LANDI, *In re.* ✓
GIORGI *v.* NAVANI.
Sir Wilfrid Greene M.R.

Their obligations with regard to rent received are prima facie the usual obligations of trustees. I may add in passing that where there are more than four co-owners the effect is to vest the land in the Public Trustee and, assuming that he receives the necessary request to act, there can be no question that in respect of his ownership, his possession, his receipt of rents and profits, his capacity is that of a trustee and none other.

There is one further point to which I may call attention in this connection. Under the old law, when one tenant in common died, his heir or devisee, before 1897, and since 1897 his legal personal representative, succeeded to his rights and succeeded to his rights at law, with the result that that legal personal representative had, equally with the surviving tenant in common, a right to possession and a right to receive the rents and profits. One result of the Law of Property Act, 1925, is to take that right away. When one tenant in common dies now (I will still call him a tenant in common) his legal personal representatives have no right to go into possession and have no right to collect the rents; that right survives and survives only to the survivor in his capacity as surviving trustee, and, unless and until another trustee is appointed, his hand, and his hand alone, is the hand to receive the rents. ✓

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That has got some bearing, as will at once appear, upon the question with which I am now about to deal, because the effect of the Act has been to deprive the legal personal representative of a deceased co-owner of any right himself to go into possession or to obtain the rents, and by that means prevent the other co-owner continuing to enjoy the currency of the Statute of Limitations, if (as it is argued) it still applies. If he wished to stop the running of time (assuming that it does run), he would have to take more elaborate proceedings to do it.

Now prima facie (and this is really, I think, not disputed by Mr. Wynn Parry) s. 12 of the Real Property Limitation Act, 1833, does not upon its face contain language apt to apply to the situation as it exists since December 31, 1925. Sect. 12 is contemplating a quite different state of affairs to that which now exists. It is contemplating the legal ownership of land owned by joint tenants, tenants in common or coparceners, carrying with it the rights which those interests conferred. The language is quite inapt to cover the case of one of two trustees who are also their own beneficiaries, and for this reason, if none other, that a trustee in possession can never be possessing for his own benefit; he can never be receiving rents and profits for his own benefit, and therefore if the matter stood there I should have had no difficulty in coming to the conclusion that s. 12 of the Act of 1833 has no application to the case and that the period since December 31, 1925, must, for the purpose of the Statute of Limitations, be dealt with upon the footing that the possession of Mr. Landi was the possession of a trustee, in whose favour no Statute of Limitations could run, because he would have been in possession of trust property and the rents that he received would have been trust property and he therefore would have been accountable for the entirety as from January 1, 1926.

But, in answer to that argument, attention is called to s. 12 of the Law of Property Act, 1925. That section is as follows: "Nothing in this part of this Act affects the "operation of any statute, or of the general law for the "limitation of actions or proceedings relating to land." I need not read the rest, which deals with easements and things of that kind. It is said that before the Act came into operation the Statute of Limitations relevant to the case embodied s. 12 of the Act of 1833, a section which enured for the benefit of a tenant in common who had been in possession for his own benefit, and that the language of s. 12 of the Act of 1925 must be construed so as to lead to the result that a tenant in common who had been in possession for his own benefit previously to December 31, 1925, should be considered thereafter as still remaining in possession in a similar character, notwithstanding the fact that he had had imposed upon him by the Act the character of a trustee. It is said that unless that effect be given to s. 12 of the Law of Property Act, 1925, a curious result will be produced, that s. 12 of the Act of 1833 is left upon the statute book with no apparent subject-matter upon which it can act. That argument is one that does not particularly impress me, because

C. A.
1939
LANDI,
In re.
GIORGI
v.
NAVANI.

Sir Wilfrid Greene M.R.

it would not be strange to find in dealing with this very complicated and novel land legislation that a particular section like that had been left unrepealed. I do not know that that section may not have some scope or operation in regard to other matters, it may have some operation in a case where there are more than four co-owners, I do not know, and I do not pause to inquire whether there might not be a case where it might still have an operation. But, even if there are no such cases, I should not be embarrassed by that argument; and in passing it is worth noticing that many of the repeals consequential upon this legislation were not made until later because the necessity had escaped the observation of the Legislature at the time. For example, the section of the Act of Anne which conferred the right on one co-owner to obtain an account from his fellow co-owner, although it had become unnecessary and obsolete by the passing of the Law of Property Act, 1922, was not repealed until the Act of 1924. But, however that may be, I find myself unable, as a matter of construction, to give to s. 12 of the Law of Property Act, 1925, the effect which is claimed for it. To make s. 12 of the Act of 1833 apt to cover the present position under which co-owners are trustees, would involve an alteration of its language, which I find myself extremely difficult to make, because it would involve recasting the whole of a section aimed, as I have already said, at one particular type of right in order to fit it to a totally different type of right. I cannot extract any such wide and sweeping effect from the language of s. 12 of the Act of 1925, which appears to me to be directed to very much simpler matters. It is further to be noticed—and this, I think, is a very important aspect of the matter (as was pointed out by Clauson L.J. in the course of the argument)—that land is defined by s. 205 of the Act of 1925, unless the context otherwise requires, as excluding an undivided share in land. That is inconsistent with and, indeed, as the Lord Justice pointed out, flows from the scheme of the Act in dealing with undivided shares. It is worth noticing that the section which first introduced that scheme, namely, s. 10 of the Law of Property Act, 1922, is expressed in this language: "For removing the difficulties incidental "to land being held in undivided shares, and for preventing "the creation of undivided shares in land, except under a "settlement and behind a trust for sale, the provisions contained "in the Third Schedule to this Act (under which land held in "undivided shares is vested or will become vested in trustees "on trust for sale) shall have effect." The object therefore was to get rid of well known practical inconveniences and substitute for the real rights of the co-owners personal rights by converting their interests into personalty by virtue of the statutory trust for sale; and this was done by putting up the screen, so to speak, of the trusteeship affecting the legal estate and keeping the beneficial interests behind it. That being the position, and interests of co-owners being now interests which merely entitle them to enforce the trusts for sale and to secure by proper means their proper share of the proceeds and the rents until sale—those being their rights, it was natural that in the definition of land, undivided shares should be excluded, and therefore on that ground, if none other, I should be prepared to say that s. 12 of the Act of 1925 has no application to the present case. But that is only an additional ground re-enforcing, I think, the view which I have expressed, that, applying s. 12 of the Act of 1925, s. 35 of that Act and s. 12 of the Act of 1833 to the circumstances of this case, it is not possible so to construe them as to give to them the joint effect for which Mr. Wynn Parry contends. I can myself see no reason in good sense why the Legislature should have wished to enable trustees of this character to be in any better position with regard to the Statute of Limitations than any other trustees, or than the Public Trustee himself is in a case where land held in undivided shares vests in him. If the Legislature had wished to do that, I cannot bring myself to believe that it would have done it by leaving its intention to be extracted by applying s. 12 of the Act of 1833 to a set of facts to which its language is hopelessly inappropriate and by producing that result by such language as that of s. 12 of the Law of Property Act, 1925. If my reasoning is correct, the Statute of Limitations has not run against the present claimant either with regard to her title as representative of Mr. Fantoni or with regard to her right to call for his share of the past rents.

The only matter that remains is the question how far she can recover those rents. It follows necessarily from the reasoning which I have endeavoured to expound, that as from January 1, 1926, Mr. Landi received the rents in the character of trustee, that no Statute of Limitations in respect of the rents so received, being trust moneys, could run in his favour, and that therefore the claimant is entitled to receive the rents as far back as that time.

With regard to the rents between the end of 1923, when they first began to come in, and midnight of December 31, 1925, Mr. Fantoni's right in 1924 and 1925 with regard to them was a right to claim an account of them and payment under the Statute of Anne; and even assuming in the claimant's favour that all the other various questions were answered favourably to her, she would still admittedly be met, in respect of those rents, with the fatal answer that the period of limitations for a claim to an account conferred by statute is six years. The result is that Mr. Fantoni's right in his lifetime was barred in respect of the rents during that period, six years after they were received. Accordingly the right of the claimant to recover is limited to rents as from January 1, 1926, but it extends to all the rents received since that date.

For these reasons I am of opinion that the order must be varied or discharged in order to give effect to the judgment which I have just delivered. When I said "rents" I meant, of course, the net rents less outgoings.

CLAUSON L.J. I agree for the reasons given by my Lord.

GODDARD L.J. I agree.

Solicitors for the appellant: *Clyde & Co.*
Solicitors for the respondents: *B. Hoddinott & Son.*

P. J. B.

GATTI *v.* SHOOSMITH.

C. A.

1939

July 24.

[1937 G. 2288.]

Practice—Appeal—Mistake as to effect of rule—Time for appealing expired—Discretion of Court to grant leave to Appeal—Order LVIII., *r.* 15 ; *Order* LXIV., *r.* 7.

Under Order LVIII., r. 15, where leave to appeal has not been served within the time prescribed by the rule owing to a mistake by a legal adviser, the Court may, in its discretion, grant leave to appeal, notwithstanding that the time for entering an appeal has expired.

ORIGINAL MOTION.

This was an application by the applicant, the plaintiff in the action, for leave to appeal, notwithstanding time expired for entering an appeal.

The plaintiff's action was dismissed with costs by Bennett J. on May 26, 1939. The order of the Court was dated May 26, and it was entered on June 19. On June 29, the plaintiff's solicitors received instructions in writing from her to appeal from the order, and instructions were forthwith given to counsel to prepare, and he prepared, a draft notice of appeal. It then became the duty of the managing clerk of the plaintiff's solicitors to serve and set down the notice of appeal. On reading Order LVIII., r. 15, he understood that it was a case where the time allowed of six weeks for entering an appeal was to be calculated from "the time at which the . . . . order is . . . . entered," namely, from June 19, in which case the time would not have expired until July 31. In fact the order was "the refusal of an application" within the meaning of the rule, in which case the six weeks fell to be calculated from the date of such refusal, namely May 26, and expired on July 7. On July 15, the managing clerk served notice of appeal on the defendant's solicitors and attended the Royal Courts of Justice to enter the appeal, when he was informed that the time for appeal had expired on July 7. In the meantime the plaintiff's solicitors had written on July 6 to the defendant's solicitors to inform them that the plaintiff had given instructions for a notice of appeal, and that this would be given in due course.

C. A.
1939
Gatti
v.
Shoosmith.

Hon. H. L. Parker for applicant. Before 1909 the Courts felt their discretion to be very much fettered in granting an extension of time for entering an appeal under Order LVIII., r. 15, and in *In re Coles and Ravenshear* (1), the Court of Appeal refused an extension of time for appealing, although the delay was due to a mistake of counsel as to the effect of the rule. In 1909, however, the rule was altered by prefacing it with the words: " Subject and without prejudice "to the power of the Court of Appeal under Order LXIV., r. 7." This brings in r. 7, which gives the Court far wider powers in exercising its discretion. In *Baker* v. *Faber* (2), which was an application under r. 7, the Court of Appeal granted an extension of time where the delay was owing to a mistake of counsel. In *A. H. Selwyn, Ld.* v. *Baker* (3), the attention of the Court was not called to the alteration in r. 15. In *Kevorkian* v. *Burney* (4) the Court granted the extension of time asked for.

This case is governed by *Baker* v. *Faber.* (2) The Court has full power to exercise its discretion, and it is a right and proper case in which it should exercise its discretion in favour of the applicant.

Charles Harman K.C. and *H. O. Danckwerts* for respondent. The facts in this case are indistinguishable from those in *A. H. Selwyn, Ld.* v. *Baker* (3), and it is governed by that case. There is no case where an extension of time has been granted on facts similar to those in this case. The application ought to be dismissed.

SIR WILFRID GREENE M.R. Before the year 1909, Order LVIII., r. 15, which is the Order regulating the time for appeals to this Court, was in a different form to that in which it is now cast. Under the order as it then stood, the power of this Court to extend the time for appealing required some special matter, for the reason that the appeal could not be brought except by special leave of the Court of Appeal. Under the rule as it then stood, the case of *In re Coles and Ravenshear* (1),

(1) [1907] 1 K. B. 1.
(2) [1908] W. N. 9.
(3) [1924] W. N. 195.
(4) [1937] W. N. 345.

was decided. That was a case where counsel had misconstrued the rule, and, as a result of the advice given, the appeal was out of time. It was there held that the fact that the delay was due to a mistake of a legal adviser did not constitute a ground for giving the special leave which the rule required. It is right to point out that in that case, as in subsequent cases, this Court very much disliked the imposition of a fetter upon its discretion which compelled it to refuse leave in cases where some unfortunate slip, the rectifying of which could have done no harm to anybody, had taken place. Nevertheless, at that time there was a current of authority under which this Court conceived that its discretion was fettered in that way. In 1908 the case of *Baker* v. *Faber* (1), came before this Court. That was a case where the matter in question was an application for a new trial, and the power of the Court to extend the time with regard to that application was one which rested on Order LXIV., r. 7. Order LXIV., r. 7, was in different language to that of Order LVIII., r. 15, as it then stood, and, under that rule, the necessity of some special leave (with the emphasis, so to speak, on the word " special ") did not exist ; and this Court held in that case that a mistake by counsel in advising his client as to the time within which an appeal could be brought was a sufficient ground under Order LXIV., r. 7, to justify the Court in extending the time. Lord Cozens-Hardy M.R., as Cozens-Hardy L.J., was party to the decision in *In re Coles and Ravenshear* (2), and so was Farwell L.J., and both those learned Lords Justice dealt with *In re Coles and Ravenshear* (2), as having been decided under the special language of Order LVIII., r. 15, and, therefore, that considerations were involved which did not apply where Order LXIV., r. 7, was the governing rule. Lord Cozens-Hardy there suggested that the matter might be brought to the attention of the Rule Committee. Apparently it was brought to the attention of the Rule Committee, because in May of 1909 the rule was altered. The particular drafting machinery that was adopted, was to strike out the reference to " special "leave of the Court of Appeal," and to preface r. 15 of

(1) [1908] W. N. 9. (2) [1907] 1 K. B. 1.

C. A.

1939

GATTI
v.
SHOOSMITH.

Sir Wilfrid
Greene M.R.

Order LVIII. with the words "Subject and without prejudice "to the power of the Court of Appeal under Order LXIV., "r. 7." That therefore puts the matter of enlarging the time under Order LVIII., r. 15, under Order LXIV., r. 7, as the governing rule. One would have thought that that change, coupled with the decision in *Baker* v. *Faber* (1), would have been sufficient to enable this Court to say that *In re Coles and Ravenshear* (2), no longer held good, in so far as it had been considered to be an authority compelling this Court, in cases where the delay was due to the slip of a legal adviser, to refuse to entertain an appeal which was out of time; and I cannot help thinking that that result would have taken place earlier had it not been for the fact that in 1924 a case of *A. H. Selwyn, Ld.* v. *Baker* (3), came before this Court. There the objection that the appeal was out of time was taken at the hearing of the appeal as a preliminary objection, and the explanation of the delay that was given by counsel for the appellants was that the mistake was due to a misconstruction of the rule by the appellants' solicitors. Sir Ernest Pollock M.R., Warrington L.J. and Sargent L.J., upheld the preliminary objection and based their decision upon *In re Coles and Ravenshear* (2), which the Master of the Rolls said made it quite clear that a mere mistake was not a sufficient ground for extending the time for appealing. Whether or not the omission to call the attention of the Court on that occasion to the case of *Baker* v. *Faber* (1) and the alteration of the rule was due to the fact that, apparently, the objection was taken when the appeal was opened, I do not know, but the report in the Weekly Notes (and there seems no reason to suppose that it is inaccurate) does not show that those matters were brought to the attention of the Court. I cannot help thinking that, if they had been, the Court would have regarded the alteration in the rule as restoring to it that freedom of discretion, the loss of which had been so much regretted. In a later case of *Kevorkian* v. *Burney* (4), after a full argument of these matters (although the facts were not the same there

(1) [1908] W. N. 9.
(2) [1907] 1 K. B. 1.
(3) [1924] W. N. 195.
(4) [1937] W. N. 345.

as they are here) Scott L.J. (by way, it is right to say, of dictum only) said this in reference to *In re Coles and Ravenshear* (1), and the argument of counsel in the case before him that that case governed the Court of Appeal: "I notice, "however, that the change in the form of the Rule made in "1909 and the decision in *Baker* v. *Faber* (2), were neither "of them drawn to the attention of the Court, and I cannot "help feeling that had the Court had its attention directed to "those cases, the very important change in the position "caused by the change in the form of the Rule would have led "to a different decision of this Court"; thus saying exactly what I said a moment ago; and I respectfully agree with the view there taken by Scott L.J.

Just to make the matter complete, there is mentioned in the 1939 Yearly Practice, at p. 1283, a case of *Wood* v. *Manchester Corporation* (3), decided in February, 1923, by this Court, consisting of Bankes, Scrutton and Atkin L.JJ. In that case, "the C. A. extended the time in a case "where the applicant's solicitor, on finding that his client's "Union was not prepared to take her case beyond the "Divisional Court, had omitted to take his client's instructions "as to appealing; and in that case Scrutton and Atkin L.JJ. "said that the 'vested interest' argument no longer carried "the same weight as formerly and that the time for appealing "was now constantly extended in cases where twenty years "ago it would not have been."

On consideration of the whole matter, in my opinion under the rule as it now stands, the fact that the omission to appeal in due time was due to a mistake on the part of a legal adviser, may be a sufficient cause to justify the Court in exercising its discretion. I say "may be," because it is not to be thought that it will necessarily be exercised in every set of facts. Under the law as it was conceived to be before the amendment, such a mistake was considered to be in no circumstances a sufficient ground. What I venture to think the proper rule which this Court must follow is: that there is nothing in the nature of

(1) [1907] 1 K. B. 1.
(2) [1908] W. N. 9.
(3) Not reported.

such a mistake to exclude it from being a proper ground for allowing the appeal to be effective though out of time; and whether the matter shall be so treated must depend upon the facts of each individual case. There may be facts in a case which would make it unjust to allow the appellant to succeed upon that argument.

The discretion of the Court being, as I conceive it, a perfectly free one, the only question is whether, upon the facts of this particular case, that discretion should be exercised. If ever there was a case in which it should be exercised, I should have thought it was this one. We are not, I think, concerned here with any question at all as to the merits of this case or the probability of success or otherwise. The reason for the appellant's failure to institute his appeal in due time was a mere misunderstanding, deposed to on affidavit by the managing clerk of the appellant's solicitors—a misunderstanding which, to anyone who was reading the rule without having the authorities in mind, might very well have arisen. The period involved is a very short one, it is only a matter of a few days, and the appellant's solicitors, within time, informed the respondent's solicitors by letter of their client's intention to appeal. That was done within the strict time, and the fact that the notice of appeal was not served within the strict time was due entirely to this misunderstanding. On the facts of this case, it appears to me that the case is one where the discretion of the Court ought to be exercised, and accordingly, leave will be given.

MACKINNON L.J. I agree.

FINLAY L.J. So do I.

Application allowed.

Solicitors for appellant: *Gasquet, Metcalfe & Walton.*

Solicitors for respondent: *Walmsley & Stansbury, for E. W. Marshall Harvey & Dalton, Bournemouth.*

P. J. B.

BOND *v.* NORMAN.

SAME *v.* NOTTINGHAM CORPORATION.

SIMONDS J.

1939
April 21;
May 4;
July 7, 19.

Easement—Right of support—Housing—Clearance order—Demolition notice—Equivalent support for dominant tenement—Housing Act, 1930 (20 & 21 *Geo.* 5, *c.* 39)—*Housing Act,* 1936 (26 *Geo.* 5 & 1 *Edw.* 8, *c.* 51), *s.* 26.

Where a building abuts on another building so as to support it, and the latter building enjoys a right of support by the former, the supporting building may not be demolished by its owner or by the local authority under a clearance order made under the Housing Acts, 1930 to 1936, and confirmed by the Minister of Health, without providing an equivalent support for the dominant tenement.

MOTION.

In January, 1935, a demolition notice under the Housing Act, 1930, was served on the defendant Norman in respect of certain premises owned by him and known as Aspley Place, Nottingham. These premises were comprised in the Nottingham (Aspley Place) Clearance Order, 1934, confirmed by the Minister of Health in January, 1935. The notice became operative in March, 1935, and the period allowed for vacation of the premises expired in October, 1938.

The plaintiff, George Cresswell Bond, was the owner of premises known as Aspley House, Alfreton Road, Nottingham, and 15 Peveril Street, Nottingham, on the boundary of the area subject to the clearance order, and claimed to be entitled to a right of support from the adjacent building which belonged to the defendant and had been ordered to be demolished.

The plaintiff requested the defendant Norman to give him a written undertaking that upon the demolition of the defendant's premises he (the defendant) would provide equivalent support for the plaintiff's building. The defendant Norman refused to give any such undertaking, on the ground that he was only preparing to carry out a statutory order.

The plaintiff thereupon brought these actions against the defendant Norman and the Nottingham Corporation claiming a declaration that he was entitled to equivalent support for his buildings on the demolition of Aspley Place, and he moved the Court for an interim injunction to restrain the defendants from demolishing Aspley Place or removing any support given to his house without first providing equivalent support. The motion was by consent treated as the trial of the action.

The Town Clerk of Nottingham stated in an affidavit that the defendant Norman having failed to demolish his premises within six weeks of February 6, 1939, Nottingham Corporation were entitled and obliged by s. 26 of the Housing Act, 1936 (1), to enter and demolish them on or after March 21. The corporation declined to give any undertaking to supply equivalent support, on the ground that any such undertaking would derogate from the statutory duty of the corporation.

E. J. Rimmer for the plaintiff. The plaintiff is entitled to a right of support for his property from one of the defendant's cottages, and, if this cottage is required to be demolished by the corporation, it must be done in such a way as not to damage the plaintiff's house. Whoever does the work, the defendant Norman, or the corporation, must provide equivalent support. Those who have a right to exercise statutory powers must not in so doing occasion any needless injury to any one. [He referred to *Jones* v. *Pritchard* (1), and *Geddis* v. *Bann Reservoir Proprietors.* (2)]

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(1) The Housing Act, 1936 (26 Geo. 5 & 1 Edw. 8, c. 51), s. 26: "(1.) Where as respects "any area declared by them to "be a clearance area a local "authority determine to order any "buildings in the area to be "demolished, they shall make and "submit to the Minister, for confirmation by him, an order (in this "Act referred to as a 'clearance "order') ordering the demolition "of each of those buildings.

"(2.) The provisions of the "Third Schedule to this Act shall "have effect with respect to the "making, submission and confirmation of a clearance order, and "the provisions of the Second "Schedule to this Act shall have "effect with respect to the validity "and date of operation of such an "order.

"(3.) When a clearance order "has become operative, the owner "or owners of any building to "which the order applies shall "demolish that building before the "expiration of six weeks from the "date on which the building is "required by the order to be "vacated or, if it is not vacated "until after that date, before the "expiration of six weeks from the "date on which it is vacated or, "in either case, before the expiration of such longer period as in "the circumstances the local "authority may deem reasonable; "and, if the building is not "demolished before the expiration "of that period, the local authority "shall enter and demolish the "building and sell the materials "thereof."

W. L. Roots for the defendant Norman. The effect of the clearance order is to destroy any easement of support at present enjoyed by the plaintiff. If this defendant does not demolish these cottages, the corporation will do so at his expense.

Wilfrid Hunt for the defendant corporation. We are not threatening to pull down these cottages at present.

Cur. adv. vult.

1939. May 4. SIMONDS J. The plaintiff is the owner of certain premises known as Aspley House, Alfreton Road, in the city of Nottingham. The defendant Norman is the owner of premises immediately adjoining Aspley House known as Aspley Place. The plaintiff alleges that he is entitled to an easement of support for his premises from the defendant's premises. This the defendant does not dispute. The evidence is uncontradicted that the wall of the plaintiff's premises where it abuts on the defendant's premises is and has for 50 years or more been supported by those premises, and that, if they are demolished, there is the most serious danger of a collapse of the plaintiff's premises unless some equivalent support is provided. The defendant threatens and intends so to demolish his premises unless he is restrained from so doing by this Court, and seeks to justify his act by the facts which I now state.

The defendant's premises, together with other premises in its immediate vicinity, were the subject of a clearance order made by the council of the county borough of Nottingham under the authority of the Housing Act, 1930, and confirmed by the Minister of Health by an order called the Nottingham (Aspley Place) Housing Confirmation Order, 1935. The effect of the order, so far as it concerned the defendant, was that he

(1) [1908] 1 Ch. 630.

(2) (1878) 3 App. Cas. 430.

was to demolish his premises before the expiration of six weeks from the date on which they were vacated, or of such longer period as in the circumstances the council might deem reasonable. If he fails to do so, he incurs no penalty, but the council is under a duty to enter and demolish the premises and to sell the materials thereof. The last occupant of the premises vacated them on February 6, 1939, and it then became the duty of the defendant to demolish them. The plaintiff had good ground for thinking that he intended to do so without providing support for his building, and began these proceedings.

Six weeks having passed since February 6, 1939, and the defendant having failed to demolish the premises, it became the right and the duty of the corporation of Nottingham to enter and demolish them, unless the time for the defendant to do so was enlarged. The plaintiff, realizing this fact, and failing to obtain any satisfactory assurance from the corporation, began an action against them, which has been by order consolidated with the action against the defendant Norman. In the consolidated action the plaintiff now moves against both defendants. But in the course of the hearing it appeared that the corporation proposed, as their usual practice was, to enlarge the time for the defendant to demolish the premises, and in answer to my question their counsel explicitly stated that they did not now threaten and intend themselves to demolish the defendant's premises. What they may do, if within the enlarged time the defendant does not do the work, is, of course, a matter which is at large, and I can deal with it when occasion arises. The only question with which I now have to deal is whether the defendant Norman can use the clearance order as an excuse for doing that which he could not otherwise do—namely, remove the support to which the plaintiff's premises are entitled without providing equivalent support. I thus state the right of the plaintiff as dominant owner; for it is clear that there is no interference with this right if one mode of support is substituted for another, provided that the actual support is still continued: see *Bower* v. *Peate.* (1)

(1) (1876) 1 Q. B. D. 321, 327.

In my judgment, the defendant Norman wholly fails to justify what he proposes to do. It is true that the obligations of the owner of a servient tenement are negative; he is not bound to execute repairs necessary for the enjoyment of the easement by the owner of the dominant tenement. The defendant would not be liable if, by reason of natural decay or other circumstances beyond his control, his premises fell down: see per Parker J. in *Jones* v. *Pritchard*. (1) But no authority has been cited to me which suggests that an act is any less the voluntary act of the actor because it is done in compliance with an order of a local authority, even though that order has been reinforced by the confirmation of the Minister of Health. The quality of the act is the same whatsoever may be the reason for doing it. Nor, in fact, is there any sort of compulsion on Norman; the Act imposes no sanction or penalty. If he does not demolish, the worst he suffers is that the local authority does so in his place and charges him with the cost of it. He chooses to do it himself, and, so choosing, is bound to have the same regard for the rights of his neighbours as in the performance of any other voluntary act.

The injunction against the defendant Norman will be perpetual and, by consent, the motion will be treated as the trial of the action. As against the defendant corporation, the motion will stand over, with liberty to restore at the shortest possible notice if they propose to demolish without providing support. I am sure that in good faith the corporation would not do anything of the kind.

July 7. The corporation, having given notice to the plaintiff that, the defendant Norman having failed to demolish the premises, they proposed to do so, and without providing equivalent support, the motion was restored.

E. J. Rimmer and *A. J. Irvine* for the plaintiff. The corporation is bound to provide equivalent support. The evidence is undisputed that, if Norman's house is pulled down

(1) [1908] 1 Ch. 630, 637.

without taking special precautions, the plaintiff's house will be seriously damaged.

The act of demolition ought to include the act of giving equivalent support, and it would be negligence for any one to pull down the house without giving it: *Geddis* v. *Bann Reservoir Proprietors* (1), per Lord Blackburn. An action will lie for doing negligently what the Legislature has authorized.

The local authority are not derogating from their statutory duty by providing equivalent support. The cost of providing such support must be borne by the party who carries out the demolition. The land on which the support must be given belongs to Norman. Support can be provided by timber shores, or by building a wall. The plaintiff's case against the corporation does not depend on there being any proof that he enjoys an easement of support from Norman's house.

[*Lagan Navigation Co.* v. *Lambeg Bleaching, Dyeing and Finishing Co.* (2) was also referred to.]

Wilfrid Hunt for the defendants. Under the Housing Acts the local authority makes the clearance order, which is then confirmed by the Minister of Health after holding an inquiry. There is then a statutory obligation to pull down these particular houses as being insanitary. The same consequences should follow as if they fell down naturally, in which case the plaintiff would have no right of action.

The mere fact that one house has leant against another for a number of years is not conclusive evidence in favour of the existence of an easement of support. The corporation has no means of seeing the title deeds and ascertaining from them which house (if either) enjoys an easement of support by the other.

The Act clearly interferes with private rights and makes no provision for any compensation for such interference: see *East Fremantle Corporation* v. *Annois*. (3) Lord Macnaghten in that case, delivering the judgment of the Court, said: "The law has been settled for the last hundred years. "If persons in the position of the appellants acting in the "execution of a public trust and for the public benefit, do an "act which they are authorised by law to do, and do it in a "proper manner, though the act so done works a special "injury to a particular individual, the individual injured "cannot maintain an action. He is without remedy unless "a remedy was provided by the statute." The only real question is whether the power has or has not been exceeded. Where no easement of support has been proved, the corporation are under no duty to provide any support.

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(1) 3 App. Cas. 430, 455.

(2) [1927] A. C. 226, 243.

(3) [1902] A. C. 213.

E. J. Rimmer in reply. All the statutory duty to demolish emanates from the power arising under s. 25 of the Housing Act, 1930, to declare an area to be a clearance area and to demolish the houses within that area. But we are outside the area, and the order can be carried out in such a way as to protect our property. The Act gives no power to the corporation to do any damage or demolish any property which is outside the clearance area. The position of the plaintiff is much stronger where, as here, there is clearly an easement of support: see *Attorney-General* v. *Horner* (1), where Brett M.R. said that an Act of Parliament should not be construed as interfering with or injuring persons' rights without compensation, unless one was obliged so to construe it.

Cur. adv. vult.

July 19. SIMONDS J. I need not repeat the facts, which are stated in my judgment in the action between the present plaintiff and Norman. I there pointed out that, if Norman failed to demolish the houses in question within the extended time given to him for that purpose by the Nottingham Corporation, it would be their duty to do so, and the question was left at large whether, if they did so, they would be entitled to take down the wall by which the plaintiff's building is supported without providing equivalent support. Norman having failed to demolish the houses and the corporation having

(1) (1884) 14 Q. B. D. 245, 256–7.

intimated that they propose to do so without providing support for the plaintiff's building, unless it be decided that they must provide it, that question has now to be decided.

The duty of the corporation arises under s. 26 of the Housing Act, 1936. They have made, and the Minister of Health has confirmed, a clearance order ordering the demolition of the buildings in question. The order having become operative and the owner, Norman, having failed to demolish the buildings, it is their positive duty under sub-s. 3 of s. 26 to " enter and "demolish the buildings and sell the materials thereof." By sub-s. 4 of the same section it is provided that the provisions of sub-ss. 2 to 5 of s. 13 of the Act shall apply in relation to any expenses incurred by the authority under the last subsection and to any surplus remaining in the hands of the authority with the necessary modifications. No provision is made by the Act for compensation for any damage done to neighbouring buildings by the authority in the exercise of their statutory duty of entry and demolition of the buildings, subject to the clearance order. It is in these circumstances that the question arises whether the authority are authorized by the Act to do that which Norman could not do, namely, to deprive the plaintiff of the support afforded by the condemned building without providing equivalent support.

The case for the defendant corporation is simply put. For them it is contended that they have an absolute and unqualified duty, and if, in the course of performing it, they let down a neighbouring house, that is no affair of theirs and that it is immaterial whether or not, as between the owners of the demolished and the neighbouring house there was any easement of support. They concede, I think, that they must perform their statutory duty without negligence, but say that, their duty being merely to demolish, they are not guilty of negligence in the performance of it if they do not, by means of shores or otherwise, provide support for this house, which the demolished house previously supported.

For the plaintiff it is contended in the first place that, apart from the easement of support to which he is entitled, the defendant corporation have no right so to perform their statutory duty of demolition as to let down his house; in brief, demolition is negligent demolition if it is so carried out as to damage premises outside the clearance area. It is urged that it is an ordinary incident of the work of demolition to shore up the building which the demolished building has supported and that to demolish without that precaution is in effect to choose a mode of performing a statutory duty which is injurious to a third party when a method of performing it without such injury is available. The principle laid down in *Geddis* v. *Bann Reservoir Proprietors* (1) is thus invoked. Secondly, it is urged that, whatever may be the position where there is no easement of support, the Act cannot be interpreted as authorizing the defendant corporation to deprive the plaintiff of his easement, for so interpreted it would take away the plaintiff's proprietary rights without compensation. True it is that no compensation is provided for him whose house is demolished; but that, it is said, is the penalty of owning a house which has become unfit for human habitation or dangerous or injurious to the health of the inhabitants of the area, and that no such consideration applies to him whose house is outside the area and who is in no degree responsible for the condition of any house within it. It may be observed that, if the defendants are right, the result is that they, whose right of entry and demolition only arises in substitution for Norman, can yet do that which he could not do, namely, deprive the plaintiff of his easement of support. On the other hand, if the plaintiff is right in his larger proposition that, even if he had no easement, the defendants could not demolish in such manner as to let down his building, then he is in a better position than he would be if Norman complied with the demolition order: for it has not been suggested that Norman, apart from the easement, could not, in the course of demolishing his own house, let down the plaintiff's house also.

In the view which I take of this case it is unnecessary for me to determine the correctness of the plaintiff's wider proposition, which may affect many interests outside this case. For

(1) 3 App. Cas. 430.

SIMONDS J.

1939

BOND v. NORMAN. SAME v. NOTTINGHAM CORPORATION.

I think that in his narrower proposition he is clearly right. He has a valuable proprietary right which the law recognizes, an easement of support from his neighbour's house. If that right is to be taken from him it must be by plain enactment or necessary intendment. "It is a proper rule of "construction not to construe an Act of Parliament as interfering "with or injuring persons' rights without compensation unless "one is obliged so to construe it": per Lord Esher M.R. in *Attorney-General* v. *Horner.* (1) "The effect of the appel- "lants construction would be to take away the respondent's "property without any compensation. Such an intention "should not be imputed to the Legislature unless it be expressed "in unequivocal terms": *Commissioner of Public Works* v. *Logan.* (2)

Applying this principle I can find nothing in the Housing Act, 1936, which justifies the defendants in depriving the plaintiff of his right of property. It is urged by counsel on their behalf that it does not lie within their knowledge whether the premises, which it is their statutory duty to demolish, are subject to any servitude, and that it imposes a heavy burden on them if they must ascertain whether they are so subject, or, without ascertaining it, run the risk of making themselves liable to the neighbouring owner. I see little force in this contention. The possibility in fact of the neighbouring house being damaged and the possibility in law of the damage being an injury to the neighbouring owner are equally patent. If the defendants choose to ignore or to challenge the one or the other, they must do so at their own risk. Their difficulty, if any, affords no reason why the plaintiff should suffer.

In this case it is conceded that the plaintiff is entitled to an easement of support from the house which is to be demolished. The defendant corporation must, accordingly, be restrained from demolishing it without providing an equivalent support. The motion was to be treated by consent as the trial of the action. Accordingly the injunction will be perpetual. The defendants will pay the costs of the action.

The Court having been informed that the plaintiff had died

(1) 14 Q. B. D. 245, 256.

(2) [1903] A. C. 355, 363.

since judgment was reserved on July 7, judgment will be entered nunc pro tunc, and the time for appealing will be extended to six weeks after the corporation shall receive notice that representation has been taken out to the plaintiff's estate.

Solicitors: *Peacock & Goddard, for Hunt, Dickins & Willatt, Nottingham*; *Gregory, Rowcliffe & Co., for Johnstone, Williams & Walker, Nottingham*; *Sharpe, Pritchard & Co., for J. E. Richards, Town Clerk, Nottingham.*

H. L. L.

Applied. *Re* HARARI'S SETTLEMENT TRUSTS. [1949] 1 All E.R. 430.

Considered and Dictum of BENNETT, J., at p. 859, *applied.* *Re* BOYS' WILL TRUSTS. [1950] 1 All E.R. 624.

BENNETT J.

1939

June 30.

In re McEACHARN'S SETTLEMENT TRUSTS.

HOBSON *v.* McEACHARN.

[1939. M. 997.]

Settlement—Trustees—Power to invest in " stocks, funds and securities " —Shares in limited company, whether included.

A settlement contained a provision enabling the trustees to invest the trust funds in such " stocks, funds and securities " as they should think fit :—

Held, that the trustees had, under that provision, power to invest the funds in fully paid shares of a limited company.

In re Willis. Spencer v. *Willis* [1911] 2 Ch. 563 distinguished.

ADJOURNED SUMMONS.

In a settlement made on June 20, 1927, it was recited that the settlor, Dame Mary Ann Dalton McEacharn, was desirous of making a further provision for her son, Captain McEacharn, and his issue, and that, being absolutely entitled to the investments and sum of cash specified in parts 1 and 2 of the schedule thereto, she intended forthwith to transfer and pay the same to the trustees, to the intent that the same should be held on the trusts and with and subject to the powers and provisions thereinafter declared and contained of and concerning the same.

The investments in the schedule consisted of ordinary shares in limited companies, those in part 1 being ordinary shares in limited companies incorporated in Great Britain and those in part 2 being ordinary shares in limited companies incorporated outside Great Britain.

Clause 1 of the settlement provided that the trustees or trustee " shall either allow the said investments or any of "them to remain in the existing state of investment thereof "for so long as the trustees or trustee shall think fit or may "at any time or times with the consent in writing of Captain "McEacharn during his life or at the absolute discretion of "the trustees or trustee after his death sell the same investments or any of them or any part or parts thereof respectively "and shall with the like consent or at the like discretion "invest the moneys produced thereby and also the said sum "of cash in the names or under the control of the trustees "or trustee in or upon such stocks funds and securities as "they shall think fit and may at any time or times with such "consent or at such discretion as aforesaid vary any investment or investments made as aforesaid for any other or "others."

The trustees of the settlement took out this summons for the determination of the question whether the power to invest in stocks, funds and securities enabled an investment to be made in fully paid shares of a limited company.

A. L. Ungoed-Thomas for the applicants. The power to invest in stocks enables an investment to be made in fully paid shares of a company. The case differs from *In re Willis* (1), where it was held that a power to invest in preference stock was not equivalent to a power to invest in preference shares.

In *Henderson* v. *Henderson's Trustees* (2) it will be seen that a power to invest in stock was regarded as including a power to invest in fully paid shares of a company.

In the present case great weight ought to be attached to the fact that every investment in the original settlement consisted of fully paid shares in limited companies. It is only a question of form. The position is exactly the same as before, and it is simply a matter of book-keeping. [He also referred to *Morrice* v. *Aylmer* (3) and *In re Rayner*. (4)]

Wilfrid Hunt for the respondent. In s. 50 of the Companies Act, 1929, shares are treated as including stock.

BENNETT J. [after stating the facts, continued :] In my judgment the answer to the question should be in the affirmative. There is, in my opinion, no real distinction between stock of a limited company and fully paid shares of a limited company. The stock is merely capital of a company

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(1) [1911] 2 Ch. 563.
(2) 1900 37 Sc. L. R. 976.
(3) (1874) L. R. 10 Ch. 148.
(4) [1904] 1 Ch. 176.

BENNETT J.

1939

McEACHARN'S SETTLEMENT TRUSTS, *In re.* HOBSON *v.* McEACHARN.

consolidated into a mass for purposes of convenience so far as a transfer of it is concerned.

I think that the reasoning of Lord Cairns and James L.J. in *Morrice* v. *Aylmer* (1) affords a foundation on which I can base my decision in the present case. The decision of Lord Pearson in *Henderson* v. *Henderson's Trustees* (2) seems to me to be in accordance with that decision. The present case is plainly distinguishable from *In re Willis. Spencer* v. *Willis.* (3) Preference stock was specified in the investment clause in that case, with the result that the learned judge found it necessary to put a narrow meaning on the word "stock."

In the absence of a context showing that the meaning of the word is to be narrowed, the word " stocks " ought in my judgment to be so interpreted as to include fully paid shares, and I so decide for the reasons which are set out in the judgment of Lord Cairns in *Morrice* v. *Aylmer.* (1)

Solicitors : *Middleton, Lewis & Clarke.*

(1) L. R. 10 Ch. 148.
(2) 37 Sc. L. R. 976.
(3) [1911] 2 Ch. 563.

J. L. D.

1 Ch

Referred to. KAIN *v.* NORFOLK.
[1949] 1 Ch. 163

LOCK *v.* ABERCESTER, LIMITED.

BENNETT J.

1939
July 3, 4, 5.

[1938. L. 2396.]

Easement—Right of way—Carriageway—Motor-vehicles included.

Where proof is given of the user of a way by carriages drawn by horses for the required period, so as to establish the right to an easement for a carriageway, the right so acquired is one which enables the owner of the dominant tenement to use the way with mechanically propelled vehicles.

WITNESS ACTION.

In this action the plaintiff, Mrs. Mary Jane Lock, of the Old Rectory, Holt, in the county of Worcestershire, sought a declaration that she was entitled to a right of way from her house over a close, being part of a farm known as Naunton Farm, and over the drive of Naunton Farm, owned by the defendants, Abercester, Ld., to the high road between Stourport and Worcester.

It was established by the evidence on behalf of the plaintiff that there was an easement for persons on foot and with carriages and horses over the way from the plaintiff's house to the main road.

It was contended on behalf of the defendants that the plaintiff was not entitled to cause heavy motor-vehicles to pass over the way in question.

Erskine Simes for the plaintiff.

Alexander Grant K.C. and *Roger Turnbull* for the defendants. Even if it were held that the plaintiffs had the right to use the way on foot or with carriages and horses, such a right would not include a right for their motor-vehicles to pass over it.

In *Todrick* v. *Western National Omnibus Co., Ld.* (1), the running of motor-buses over a way was held to be an excessive user.

The only test is the user in respect of which the owner of the dominant tenement has given authority during the prescribed period.

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(1) [1934] Ch. 561.

Erskine Simes referred to *Attorney-General* v. *Hodgson* (1) and was not called upon to argue.

BENNETT J. The object of this action is to establish that the plaintiff, as the owner in fee simple of an estate in the parish of Holt in the county of Worcestershire, known as the Old Rectory, has, as an appurtenance thereto, a right of way on foot and with horses, carriages and other conveyances, over a close, being a part of a farm known as Naunton Farm, and over the drive of Naunton Farm, owned by the defendants, to the high road between Stourport and Worcester. The evidence establishes that the Old Rectory was from 1847 to 1931 in the occupation of four successive rectors of Holt. In or about the year 1931 there was a union of benefices and, as a result, the Ecclesiastical Commissioners sold the Old Rectory and the land enjoyed with it to the plaintiff and her aunt. The property was conveyed to these two ladies in fee simple by a deed dated December 14, 1932. Since the date of that deed, the plaintiff's aunt has released her interest to the plaintiff, who is now seised in fee simple of the Old Rectory and the land enjoyed with it. The evidence given on behalf of the plaintiff is to the effect that since the year 1882 until the month of March, 1931, the successive rectors of Holt and persons having business at the rectory have used the way in question as a means of getting to and fro between the rectory and the said high road. There is proof that the rectors of Holt used themselves to drive their horses and carts to and from the rectory over the way in dispute without ever having been stopped and without ever having asked permission from anybody. There is proof that the butcher and the baker, during the whole of that period, have used the way in dispute for going to the rectory to deliver their goods. There is proof that tradesmen, who had sold hay and straw and corn to the various rectors, used the way in question as a means of bringing their goods, sometimes carrying them on a float and sometimes on drays, the drays being drawn by a horse or sometimes by two horses.

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(1) [1922] 2 Ch. 429.

There is a cloud of witnesses, and their evidence is unimpeachable as to the general use over the period I have stated, namely, more than forty years, of the way in question as a means of getting with horses and carts to and from the rectory. Having heard the evidence, I have no doubt whatever that the plaintiff has established that there is an easement of way for persons on foot and for carriages and for horses over the way in dispute from the rectory to the main road between Stourport and Worcester.

Since the rectory has been in the possession of the plaintiff and her aunt the use they have made of the house and land has differed from the use to which it had been put by the several rectors who had occupied it before them. They began to use the land for agricultural purposes, and I gather that now they keep cows, pigs and chickens which require to be fed, and the evidence is that the tradesmen supplying the goods which the animals consume, and using the way in dispute as the means of getting these goods to the Old Rectory, instead of bringing the goods in horse-drawn vehicles, bring them in mechanically propelled vehicles. The vehicles weigh more than did the horse-drawn vehicles which were used in the days before internal combustion engines had been invented, and, perhaps not unnaturally, the present occupant of the field over which the way in dispute passes, does not like mechanically propelled vehicles passing over his land and neither do his landlords, the defendants. The question is whether the defendants have the right to object to the way in dispute being used by motors.

In March, 1938, the defendants, taking the view that the plaintiff had no right of way at all over their land, and that the way over it which theretofore had been enjoyed had merely been permissive, locked one of the gates which is on the way in dispute and denied the right of the plaintiff to use it. That act gave rise to the present litigation. I have already said that in my judgment the evidence has established beyond all question as appurtenant to the rectory, a right of way on foot and with horses and carriages over the way in dispute. But there has been no proof that until recently the carriages using the way were other than horse-drawn vehicles.

The point which Mr. Grant has taken is that, in order that a way may be claimed by prescription for motors, there must be proof that the way has been used by mechanically propelled vehicles for the period of time specified in the Prescription Act.

In my judgment that is not the law. What is claimed and what is prescribed for is a carriageway. The right, if established, is for the use of the way by carriages, not for a particular type of carriage or for carriages drawn by a particular kind of animal.

The law must keep pace with the times. As a matter of law I propose to decide that, where proof is given of the user of a way by carriages drawn by horses for the required period so as to establish the right to an easement for a carriageway, the right so acquired is one which enables the owner of the dominant tenement to use the way with mechanically propelled vehicles.

Solicitors: *Clinton & Co., for Harrisons, Worcester; Edwin Coe & Calder Woods, for Tree, Hemming & Johnston, Worcester.*

J. L. D.

In re PAYNE'S DECLARATION.

In re PAYNE (DECEASED).

POPLETT *v.* ATTORNEY-GENERAL.

SIMONDS
J.

1939

June 14:
July 3, 6, 7,
26.

[1939. P. 794.]

Revenue—Estate Duty—Voluntary settlement on family—Death of settlor within three years—Changes of investment and increase of value of settled funds—Duty levied on settled property as at date of death—Ascertainment of value—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-s.* 1 (*c*); *s.* 5, *sub-s.* 1; *s.* 7, *sub-s.* 5*—Finance* (1909–10) *Act,* 1910 (10 *Edw.* 7, *c.* 8), *s.* 59.

A settlor by a voluntary settlement in effect settled (*a*) the benefit of a certain option and (*b*) a sum of 10,000*l.*, which in exercise of the option was immediately invested by the trustees in the shares of a company of which he was the chairman and the principal shareholder. The settlor died within a year of executing the settlement. At the date of his death there had been changes in the investment of the settled funds, and, owing to the issue of a capital bonus by the company and considerable capital appreciation, the value of the funds subject to the trusts of the settlement was over 49,000*l.* :—

Held, (1.) that estate duty became payable, under the Finance Act, 1894, s. 2, sub-s. 1 (*c*), as amended by the Finance (1909–10) Act, 1910, s. 59, on the settled funds in the condition they were in and at the value they bore at the date of the settlor's death, and not as at the date of the settlement.

Quaere whether this principle is applicable to the case of an absolute gift made by a testator in his lifetime.

(2.) That the corpus of the settled property on which estate duty was payable should be aggregated with other property passing on the death of the testator so as to form one estate.

Lord Strathcona v. *Inland Revenue*, 1929 S. C. 800, considered.

In re Hodson's Settlement, ante p. 343, applied as to aggregation.

SUMMONS.

The following statement of facts is taken from the judgment: These proceedings were begun by originating summons under s. 3 of the Administration of Justice (Miscellaneous Provisions) Act, 1933, for the purpose of determining certain questions with regard to the estate duty payable on the property subject to a declaration of trust made by the late Captain Matt Payne on January 29, 1936. The plaintiffs are the present trustees of the declaration of trust and the defendant is His Majesty's Attorney-General.

The facts are not in dispute. In January, 1936, Captain Payne was the sole registered proprietor of a number of patents and was the joint registered proprietor with his brother, William A. Payne, of other patents. He was at the same time a director of the British Thermostat Company, Ld., in which he had a large interest. In the same month an agreement was made between that company and Captain Payne and his brother for the purchase of all the patents for the sum of 13,883*l.* in cash, with an option to acquire 8000 1*l.* ordinary shares in the company at 35*s.* a share. On January 29, 1936, Captain Payne, to whom I will refer as "the settlor," executed a declaration of trust by which, after reciting the position with regard to the patents and that, as part of a family arrangement for making some provision for his parents, his wife and issue, and other members of his family, he was desirous of settling his estate, share or interest in the said patents and in the proceeds of sale thereof, he declared that he and the trustees of that declaration, to be appointed as thereinafter provided, would hold the same on trust to permit the same to remain as invested or to sell and convert the same into money and invest the proceeds in the names of the settlor and his said brother as therein mentioned. He then directed that the trustees should stand possessed of the trust fund on certain beneficial trusts therein set out. It is unnecessary to refer to them in detail. On the same day, in part fulfilment of the agreement already made, the settlor, in consideration of the sum of 10,000*l.* then paid to him by the British Thermostat Company, Ld., which I will call "the company," assigned to the company the patents or (as the case might be) his share and interest in the patents referred to in the schedules to the assignment. It appears that the sum of 10,000*l.* was in fact paid by the company to the settlor by a cheque drawn in his favour, which he then paid into an account opened with the Westminster Bank in the names of himself and his brother as trustees. On the same day, by a further assignment, to which the settlor, his brother, W. A. Payne, and the company were parties, after recitals whereby it appeared that the settlor desired to give to his brother the benefit of the patents mentioned in the first schedule thereto and the interest of the settlor in the patents mentioned in the second schedule thereto, and that his brother had agreed to sell the same to the company for 3883*l.*, the settlor in consideration of the sum of 3883*l.* paid by the company to his brother assigned to the company the patents or (as the case might be) the share and interest of the settlor in the patents mentioned in the first and second schedules thereto. The sum of 3883*l.* was duly paid to W. A. Payne.

In neither assignment was anything said about the option to take shares in the company, but I assume that this option was in fact part of the consideration for the transfer of patents or patent rights, and that it became exercisable by the trustees and W. A. Payne in the proportion which 10,000*l.* bore to 3883*l.* On January 30, 1936, the trustees exercised the option so far as they had funds available, paying 10,000*l.* to the company and becoming entitled to 5714 and 10/35ths 1*l.* shares. On the same day W. A. Payne paid 3883*l.* to the company and acknowledged himself indebted to the company in the further sum of 117*l.* by way of subscription for 2285 and 25/35ths 1*l.* shares, and requested the company to issue 2000 of such shares to him, and the remaining 285 and 25/35ths shares to the settlor and him as trustees of the declaration of trust. This was duly done, so that the trustees had allotted to them 6000 ordinary shares of 1*l.* each, of which 285 and 25/35ths shares were in effect settled by W. A. Payne, the remaining 5714 and 10/35ths being the investment of the sum of 10,000*l.* settled by the settlor.

On February 6, 1937, the settlor died, and on May 6, 1937, W. A. Payne died. In each case less than three years elapsed between the date of settlement and death, so that claims arose for estate duty under s. 2, sub-s. 1 (*c*), of the Finance Act, 1894, as varied by the Finance (1909–10) Act, 1910.

Certain further facts must be stated before the nature of these claims and the questions which arise on them are examined. The financial arrangements of the company are not very clearly stated in the evidence, but it appears that the capital, before January 18, 1936, was 50,000*l.*, divided into 25,000 preference shares of 1*l.* each and 25,000 ordinary shares of 1*l.* each, and that on that day it was increased to 150,000*l.* by the creation of 100,000 further ordinary shares of 1*l.* each. It further appears, though somewhat obscurely, that, at or about the same time, an option was given to the settlor and his brother to take up 8000 shares at 35*s.* each, the directors of the company were authorized to issue 10,000 ordinary shares at the price of 30*s.* a share to existing shareholders and had placed at their disposal a further 1385 similar shares to issue at the same price as they might consider in the best interests of the company. I mention this fact because some importance was attached to it by the plaintiffs, but there is no evidence that any shares were in fact issued for 30*s.*

Further alterations were from time to time made in the capital structure of the company. In April, 1936, bonus shares at the rate of one share for every share held were issued to the ordinary shareholders. In May, 1936, the preference shares were converted into ordinary shares and each share was divided into four shares of 5*s.* each. At the same time 48,000 shares resulting from the sub-division of certain shares were called " Founders' shares " and given certain special rights, 16,000 of these shares being given to the trustees. At the same time the company was converted into a public company and adopted new articles of association. It was exceedingly prosperous, with the result that the ordinary shares of 5*s.* each were quoted at a high figure on the Stock Exchange. Of this fact the trustees took some advantage, realizing some of the ordinary shares before the settlor's death, at which date the trust funds consisted of 15,000 ordinary 5*s.* shares and 16,000 Founders' 5*s.* shares of the company, 911*l.* 8*s.* advanced on mortgage, 500 1*l.* shares in De Havilland Aircraft Company, Ld., 65 5*l.* shares in Legal and General Assurance Company, Ld., 100*l.* of stock in the British Electric Traction Company, Ld., 500 shares of 1*l.* each in the Assurance and Finance Trust, Ld., 2500*l.* 2½ per cent. Funding Loan, and 740*l.* 5*s.* 11*d.* in cash.

Cyril King K.C. and *Frederick Grant* for the trustees of the settlement. The property settled by the testator was the sum of 10,000*l.* in cash and an option to purchase certain shares in the company, the value of which at the time was 3883*l.* It is submitted that the duty is payable on that value. Subsequent manipulations or changes of investment by the donee cannot increase the duty payable, or alter the subject-matter of the gift. The Crown has made various alternative claims under s. 2, sub-s. 1 (*c*), of the Finance Act, 1894. The second alternative claim is that the subject-matter of the gift was Captain Payne's interest in the patents and the option to purchase shares in the company, the valuation to include the bonus shares issued. See Finance Act, 1894, s. 22, sub-s. 1 (*a*), for the definition of " property."

There is no general intention or policy to be derived from the language of a taxing statute: per Lord Warrington in *Adamson* v. *Attorney-General.* (1) See Hanson on Death Duties, at p. 79. And see the judgments of Collins and Vaughan Williams L.JJ. in *Attorney-General* v. *De Préville* (2) as to the meaning of the word " property." We know exactly what was given away, and that is the subject of the account; non constat that the donor would have done all the things in relation to the property that the donee may have done. The process of issuing bonus shares means the issue of so much money to the shareholders, who use it for the purpose of buying new shares.

The point appears to have arisen in various cases, but has never come to a decision except in *Lord Strathcona* v. *Inland Revenue.* (3) The judgments of the learned Lords in this case differ, but our contention is that Lord Clyde's view is the one which most nearly meets the requirement of

(1) [1933] A. C. 257, 275.
(2) [1900] 1 Q. B. 223, 229, 230.
(3) 1929 S. C. 800.

the statute. He alone realized that the duty is levied on the value of the thing given. [They also referred to *Attorney-General for Ontario* v. *National Trust Co., Ld.* (1), and *In re Hodson's Settlement.* (2)]

J. H. Stamp for the Crown. The Acts imposing estate duty treat the settled fund as the settlement, and unless that position is accepted there are gaps revealed in the law. The interest of the beneficiaries is not so much in the 10,000*l.* originally settled as in the settled fund subject to the settlement. Their rights also are not fixed once and for all, but are subject to variation owing to the exercise of powers given by the settlor to the trustees. It cannot be said, for instance, that a reversioner will take 10,000*l.* out of a settlement just because 10,000*l.* has been put into it; it may be more or less. See Finance Act, 1894, s. 5. Property once taxed is not to be taxed again while the settlement lasts, because in spite of all changes of investment and other events it is regarded as the same property. The actual property may in the end be entirely different from the original fund, but from the point of view of the Act it is the same settled fund. Settled property pays duty once only, and there is no aggregation with other property, though it may have completely changed its character and value.

The substance of the transaction must be examined; the facts must be seen in the light of the documents. The proper way of construing a taxing statute is stated in *Braybrooke* v. *Attorney-General.* (3)

The beneficiary under a settlement is entitled to a chose in action, and his rights attach to the property as a floating charge. Property may be said to be both given and taken away by a settlement, for the trustees may sell it and purchase other property with the proceeds of sale, which then comes into the settlement. It is part of the disposition that the trustees should have a power of sale; in the same way it is their duty to retain a capital accretion to funds.

That is the view of the matter which commended itself to

(1) [1931] A. C. 818.
(2) Ante p. 343.
(3) (1861) 9 H. L. C. 150.

Clauson L.J. in delivering the judgment of the Court in *In re Hodson's Settlement.* (1)

For the purposes of estate duty, quite different considerations apply to settled property, and property given outright. The peculiarity of a disposition by way of settlement is that it is intended to endure for a term of years and the property is kept in the settlement. The property is given, and yet under the same disposition it may be taken out of the settlement by the trustees provided other property replaces it. The Crown taxes, not any particular property, but the settled fund at each stage in its history. By s. 7, sub-s. 10, property passing on the same death is not to be aggregated more than once, and by s. 5, sub-s. 2, once duty is paid, the property is exempt from further duty until the death of the person competent to dispose of it.

The effect of disregarding the special character of a settlement would be to strike out s. 5 from the Act. The identity of the property is one conferred by the settlement. See *In re Hodson's Settlement* (2), per Clauson L.J. (delivering the judgment of the Court), where he said: "To apply that test is to "treat the Legislature as fixing attention not on the items "which make up the corpus which passes on the death, but "on the corpus which is the subject-matter of the disposition ". . . . the identity of the individual items, varying, no "doubt, from time to time as changes of investment take "place, being of no consequence as compared with the identity "of the corpus as that which was originally the subject of the "disposition and is the object which passes."

The corpus is an identifiable corpus, the same at all times for tax purposes, and the beneficiary has an identifiable right in it.

If there were no settlement, but an absolute gift, as in *Lord Strathcona* v. *Inland Revenue* (3), quite different and more difficult considerations would arise.

To impose a retrospective tax on the property as it was at the date of the settlement is to put the trustees and beneficiaries in a very serious dilemma. It would be quite impracticable as a rule to fix the value.

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(1) Ante pp. 343, 355.

(2) Ibid. 370.

(3) 1929 S. C. 800.

Cyril King K.C. in reply referred to *Attorney-General* v. *Milne* (1) and the judgment of Lord Sands in the *Strathcona* case. (2)

Cur. adv. vult.

1939. July 26. SIMONDS J. [after stating the facts as above, proceeded :] No distinction has been or can be made between the shares settled by W. A. Payne and those purchased by the trustees with the 10,000*l.* settled by the settlor, and it has been assumed throughout that I may treat 20/21st parts of the fund as originating with the settlement made by the settlor and the remaining 21st part as provided by W. A. Payne. It is on this basis that the Attorney-General claims that estate duty is exigible on the death of the settlor on 20/21st parts of the value as at the death of the settlor of the trust funds as they existed at that date. It is this claim which is in the first place challenged by the plaintiffs, who are the present trustees of the declaration of trust.

The claim to estate duty arises under s. 2, sub-s. 1 (*c*), of the Finance Act, 1894, which provides that "Property passing "on the death of the deceased shall be deemed to include the "property following, that is to say:—(*c*) Property which would "be required on the death of the deceased to be included in an "account under section thirty-eight of the Customs and Inland "Revenue Act, 1881, as amended by section 11 of the Customs "and Inland Revenue Act, 1889, if those sections were herein "enacted and extended to real property as well as personal "property, and the words 'voluntary' and 'voluntarily' and "a reference to a 'volunteer' were omitted therefrom."

Sect. 38 of the Customs and Inland Revenue Act, 1881, as so amended and re-enacted so far as is material for the present purpose reads as follows: "The personal property "to be included in an account shall be property of the following "descriptions—namely, (*a*) any property taken as a donatio "mortis causa made by any person dying after February 1,

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(1) [1914] A. C. 765.

(2) 1929 S. C. 800.

"1894, or taken under a disposition made by any person so "dying purporting to operate as an immediate gift inter vivos "whether by way of transfer, delivery, declaration of trust or "otherwise, which shall not have been bona fide made twelve "months" (now three years) "before the death of the "deceased." Sub-head (*b*) I need not set out. By sub-head (*c*): "Any property passing under any past or future settlement ". . . . made by any person dying after such day . . . . "whereby an interest in such property . . . . is reserved ". . . . to the settlor."

The claim in this case arises under head (*a*); I set out head (*c*) only because counsel for the plaintiffs rely on the distinction between property taken under (*a*) and property passing under (*c*).

What, then, for the purpose of estate duty under s. 2, sub-s. 1 (*c*) of the Finance Act, 1894, is this "property taken" under the declaration of trust of January 26, 1936, and how and as at what date is the value of such property to be ascertained?

It is at least clear what the settlor settled. He had, before executing the declaration of trust, agreed to sell the patents and patent rights the subject of that declaration, and on the footing that the agreement was carried out, as in fact it was, he could and did settle nothing more than the sale price which the company had agreed to pay him—that is to say, the sum of 10,000*l.* with an option to acquire ordinary shares of the company at 35*s.* a share. That is clear, and this also is clear, that the only relevant date for the purpose of valuing property which passes on the death of the deceased is the date of his death: see Finance Act, 1894, s. 7, sub-s. 5, and *Lord Strathcona* v. *Inland Revenue*. (1) The question of difficulty on which the parties are at issue is what is the property of which the value has to be ascertained at the death of the deceased. The contention of the Attorney-General has already been stated: the property which passes on the death was the trust fund as it then existed. The plaintiffs, on the other hand, say that it is essential to see what was on January 26, 1936, taken under the disposition made on that date; it was the sum of 10,000*l.* and an option, and it is that property so taken which must be valued at the death. Each side points to the hardships and anomalies which the other view involves.

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(1) 1929 S. C. 800.

A gift of little value enormously appreciates by the date of death by reason of the skill and exertion of the donee. Is he to pay duty on a value largely created by himself? A gift of great value becomes worthless by the date of death through no fault of the donee. Is he to pay duty on a value which would not in any case have existed at the death of the donor? The dull subject of duties has been agreeably illustrated by examples taken from the racecourse, such as the colt optimistically regarded as a Derby winner by donor and donee which proved to be the merest "plater." This and other examples from animal life enliven the judgments given in the Court of Session in *Strathcona's* case. (1) But I think that that case does not afford any authority for determining the point which I have to decide. It does decide that the date of valuation is the date of death, but though I find much in the judgments to support any view as to the subject-matter of valuation, on this point I cannot find any majority in favour of one view or another. I must form my own opinion without the assistance which I should have welcomed from the Court of Session.

The real problem is to reconcile the two elements: (*a*) property taken under a disposition made in (say) 1936, and (*b*) a valuation to be made in (say) 1939. Where, as under the Act of 1881, only an interval of three months between gift and death was in question, probably there was little difficulty. It is the enlargement of this interval to twelve months and then to three years which makes the problem so serious. It is surprising that the matter has not come up for judicial consideration, for since my early days at the Bar I have frequently heard it discussed. Presumably a compromise between the Estate Duty Office and the subject has been reached whenever the question has been raised.

It is to be observed that the disposition may be by way of gift outright or by way of settlement. It is the latter class of case with which I have to deal, and I think that it is the easier

(1) 1929 S. C. 800.

class of case. Where there is a settlement which persists to the date of death, it is not, I think, difficult to regard the trust property, in whatever state it may be at the death, as the same property as that which was taken under the disposition. The claim was thus formulated on behalf of the Attorney-General—namely, that the subject-matter of the gift is in each case the settled fund—that is, in this case the property originally made subject to the declaration of trust, subject to and with the benefit of the duties and powers invested in the trustees by the trust, including the power of investing money and varying investments, and that the settled fund as it actually existed at the death of the settlor is, therefore, the property deemed to be included in the property passing on death, and the valuation as at the date of death should relate to the investments and moneys representing the corpus of the trust fund at that date.

In support of this contention Mr. Stamp referred to other provisions of the Finance Acts in which a continuing identity is attached to the property from time to time subject to a settlement through all its changes of investment. In particular, he relied on s. 5, sub-s. 1, of the Finance Act, 1894, which dealt with the exemption of settled property which had borne duty from future estate duty where it passed to some person not competent to dispose of it. He pointed out that this exemption had always been interpreted as applying equally to cases where the settled property remained unchanged through the period of settlement, and to those in which it had been sold and the reinvested proceeds became subject to the settlement.

It is indeed clear that, if this interpretation is not right, and the exemption is given only where the same property bears duty and then passes a second time, the obvious intention of the section would be largely defeated. Again, under the very section which I have to consider, it might well be, if the plaintiffs are right, that duty would be leviable both under head (*a*) on the actual property which was the subject of the trust disposition and under head (*c*) on the settled property actually in existence at the death, for s. 7, sub-s. 10, of the Finance Act, 1894, which provides that estate duty in respect of property passing on any death shall not be levied more than once on the same death, can have no operation except in respect of the same property.

These are, in my judgment, cogent considerations in favour of the claim made by the Attorney-General. They reconcile, in a way which appears to be consistent with the general policy of the Act in dealing with settled property, the discordant elements to which I have referred. I am conscious that in isolating gifts by way of settlement from other forms of gift I am not solving all the difficulties which the section provides. Nor should I be justified in thus isolating them if it was clear that in the case of outright gifts that which had to be valued at the death was the actual subject-matter of the gift regarded as in a hypothetical state of preservation in the condition in which it was given. For then it might well be said that the same principle must be applied to all kinds of disposition. But in view of the difficulties—well-nigh insoluble as I humbly think—which may arise in the case of outright gifts, it is permissible, I think, to adopt in regard to gifts by way of settlement a construction which is consistent with the policy of the Act and does not appear to create any hardship to the subject or to cause any administrative inconvenience.

A further question has been raised—namely, whether the corpus of the settled property in respect of which, as I hold, duty is payable under s. 2, sub-s. 1 (*c*), of the Finance Act, 1894, is aggregable with other property of the settlor passing on his death so as to form one estate for the purpose of determining the rate of duty. It has been urged on behalf of the plaintiffs that it is saved from aggregation by the proviso to s. 4 of the Act on the ground that the settlor never had an interest in the actual property which was in existence at the date of his death. In a sense this proposition is true, but I cannot give effect to it consistently with the decision of the Court of Appeal in *In re Hodson's Settlement.* (1) In that case the question related to the aggregation of an accumulations fund which, as it was held, passed under s. 1 of the Act, but every word of the judgment of the Court (2) is equally applicable to

(1) Ante pp. 343, 369, 371.

(2) Ante pp. 369–371.

property the subject of a trust disposition which passes under s. 2, sub-s. 1 (*c*). I must, therefore, hold that the settled fund is aggregable with the settlor's free estate.

The same question is raised by another summons with regard to the estate duty payable on the death of W. A. Payne on the shares settled by him, that is to say, one 21st part of the property originally settled. The same answer must be given. The settled fund as at the death of the settlor Matt Payne must be regarded as divided in the ratio of 20 to 1. From the 20 parts settled by him the estate duty and any other payments chargeable against such parts must be deducted ; the remaining 21st part in the condition in which it was at the death of W. A. Payne must be valued at that date, and estate duty paid upon it at a rate determined by the aggregation of that 21st part with his other estate.

There must be declarations accordingly, and the plaintiffs must pay the costs of the Attorney-General of the summons.

Solicitors : *Wilkinson, Howlett & Moorhouse ; Solicitor of Inland Revenue.*

H. L. L.

SIMONDS J.
1939
June 27; *July* 26, 27.

In re PRUDENTIAL ASSURANCE COMPANY, LIMITED, AND *In re* THE ASSURANCE COMPANIES ACT, 1909, AND *In re* THE INDUSTRIAL ASSURANCE ACT, 1923.

[1939—P.—010.]

Insurance—Industrial assurance business—Proposed transfer of business in Eire—Petition for sanction of Court to transfer to company formed in Eire—No jurisdiction to sanction—Assurance Companies Act, 1909 (9 *Edw.* 7, *c.* 49), *ss.* 1, 13, 14—*Industrial Assurance Act*, 1923 (13 *&* 14 *Geo.* 5, *c.* 8), *ss.* 1, 12.

Under Acts of the Parliament of Eire, passed in 1936 and 1938, a company was formed in Eire for the purpose of acquiring and carrying on all industrial assurance business in the country, with power to acquire all such business now being carried on there by English companies. The effect of the legislation was that English companies could no longer carry on such business except under a system of licences, which might be withheld. An agreement was entered into between the Prudential Assurance Co., Ld., which carried on a large business in Eire, for the transfer to the Irish company of the whole of its industrial assurance business and policies in Eire, including its staff, after a certain date, and a petition was presented to the Court under s. 13 of the Assurance Companies Act, 1909, asking for its sanction to the proposed transfer:—

Held, that as since 1922 Eire was no longer part of the United Kingdom, and as under the Act of 1909 there was no power to transfer the business of an assurance company or any part thereof except to another assurance company carrying on business in the United Kingdom, there was no jurisdiction to sanction the transfer, and the petition must be dismissed.

PETITION.

The petition was presented by the Prudential Assurance Co., Ld. (hereinafter referred to as the Prudential Company), under the Assurance Companies Act, 1909, and the Industrial Assurance Act, 1923, asking for the sanction of the Court to a provisional agreement with the Industrial and Life Assurance (Amalgamation) Company of Eire (hereinafter referred to as the " terminating company ") for the transfer by the Prudential Company of all its industrial assurance policies and business in Eire to the terminating company.

The matter arose out of recent legislation by the Parliament of Eire affecting industrial assurance.

Under an Insurance Act of 1936 it was provided that it should not be lawful for any assurance company to carry on in Eire any assurance business save under and in accordance with a licence granted by the Minister under Part II. of the Act. The granting of a licence was to be subject to certain conditions. Part IV. of the Act dealt with industrial assurance and made the law of Eire applicable thereto different in several respects from English law. This Act was not satisfactory to the four Irish companies carrying on industrial assurance in Eire, and they entered into a scheme of amalgamation which was approved by the Government and to which statutory effect was given by the Insurance (Amendment) Act of 1938, repealing part of the earlier Act. The agreement and the Act provided that any other companies carrying on industrial assurance in Eire might, if they desired, transfer all such business to the proposed amalgamation.

The agreement was scheduled to the Act.

The effect of this legislation was that English companies carrying on industrial assurance business in Eire could either apply for a licence under the Act of 1936, or enter into an agreement for the transfer of such business to the amalgamation in Eire. The Prudential and other English industrial assurance companies decided not to apply for any licence under the Act of 1936, but to transfer their industrial business to the amalgamation under the Amendment Act of 1938. The agreement between the Irish companies provided that the terminating company should be formed and registered under the Companies Acts with a capital of 200,010*l.* divided into 2,000,100 shares of 2*s.* each, and should take over the business of the four Irish companies, and also have power to acquire all the industrial assurance business in Eire of any English or other companies who had such business to transfer, therein called the " adopting " companies. All the existing staff in Eire of those companies were to be entitled to employment or compensation on the basis stated in the agreement. The agreement was expressed to be conditional upon its being confirmed by Act of the Parliament of Eire. The terminating company was incorporated on October 31, 1938, and the permanent company, which would ultimately take over the amalgamated business of all the companies, was formed at a later date.

This petition was presented to obtain the sanction of the Court to the provisional agreement between the Prudential and the terminating company, but before it came on for hearing a summons was taken out for the decision of the questions whether the transfer of industrial business required the sanction of the Court, and if so whether there was jurisdiction to sanction it. On the hearing of the summons these points were raised, but not decided, and the learned judge made an order dispensing with service of the documents on all the policy holders of the company, and directing advertisements of the petition to be inserted in The London Gazette, The Times and other English and Irish newspapers. His Lordship further directed that a representative policy holder who was opposed to the proposed transfer should be served with the petition and appear by counsel to argue the question of jurisdiction and the general merits of the transfer. Mr. Robert Forsythe Stevenson, an Irish policy holder, holding two industrial policies in the Prudential, the first issued in London and the second in Dublin was the representative chosen.

Similar petitions, asking for the sanction of the Court to agreements with the terminating company, were presented by the Pearl Assurance Co., Ld., the Refuge Assurance Co., Ld., and the Britannic Assurance Co., Ld., and to these there was no opposition.

W. P. Spens K.C. and *Cecil Turner* for the Prudential Company.

We submit that the Acts do cover such a transfer and make it necessary to apply for the sanction of the Court to be given. We rely in particular on the Industrial Assurance Act, 1923, s. 12, sub-s. 3, para. (*h*), applying s. 13 of the Act of 1909 to any transfer from one company to another, howsoever effected, of the liabilities arising from industrial assurance business or any of such liabilities, in like manner as if it were a transfer of the industrial assurance business.

There is no direct authority upon the question, but a somewhat similar point arose under the Companies Act, 1862, and the Court held that there was jurisdiction to transfer the business of an English company to a foreign company.

This is a case in which, both for the protection of policy holders and employees in Eire, it is very desirable, if possible, to come to the conclusion that there is no casus omissus in the Act and to hold that there is jurisdiction to sanction the transfer. The Court in construing the Act should look at the object to be achieved.

A. Andrewes Uthwatt for the Industrial Assurance Commissioner, and *Gordon Brown* for the terminating company, supported this argument, and *Meux* v. *Jacobs* (1) was referred to.

G. R. Blanco White K.C. and *E. Holroyd Pearce* for the respondent Stevenson.

The respondent objects to the transfer mainly on the ground that his contract is with the Prudential and he has more faith in the Prudential than in any other company. The proposed agreement is a breach of his contract.

The effect of s. 26 of the Industrial Assurance Act, 1923, which governs individual novation is only to put limitations on the transfer of business from one assurance company to another within the meaning of that Act. It does not apply to a foreign company at all. It is not part of the policy of these Acts to protect individual foreign policy holders.

The question of a statutory novation was considered by Lord Parker in *United London and Scottish Insurance Co.* v. *Omnium Insurance Corporation.* (2) He said that the Act which required the consent of the Court to the transfer of insurance business did not create a statutory novation, or do more than the parties could have done for themselves but for the clause in the Act.

And see also the decision of Eve J. in *In re United British*

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(1) (1875) L. R. 7 H. L. 481, 493. (2) (1915) 84 L. J. (Ch.) 777, 783.

SIMONDS J.

1939

PRUDENTIAL ASSURANCE CO., AND THE ASSURANCE COMPANIES ACT, 1909, AND THE INDUSTRIAL ASSURANCE ACT, 1923, *In re.*

Insurance Co., Ld. (1), and that of Maugham J. on a further application in the same case (2), following the decision in a Scottish case: *Empire Guarantee and Insurance Corporation, Ld.* (3) Whether the Court gives or withholds its sanction, there will be a novation so far as Irish law is concerned.

The words "another company" in s. 13, sub-s. 1, of the Assurance Companies Act, 1909, must mean "another "assurance company." Otherwise it is impossible to say what the word "company" means. The Act defines an assurance company, but not a company. And see sub-s. 4, where "another" can only mean "another assurance "company." By virtue of the Act of 1922, which confirmed the treaty creating the Irish Free State and by the Irish Free State (Consequential Adaptation of Enactments) Order, 1923, made under s. 6 of the Act, references in any enactment passed before the establishment of the Irish Free State to the United Kingdom or the United Kingdom of Great Britain and Ireland are in the application of the enactment to any part of Great Britain and Ireland, other than the Irish Free State, to be construed as exclusive of the Irish Free State. The only Court whose sanction is required to this transfer is the High Court in Eire.

Under the Industrial Assurance Act, 1923, a registered friendly society can transfer its engagements to an industrial assurance company, but not to a company which is not an industrial assurance company: see s. 37.

Counsel also referred to the Life Assurance Companies Act, 1872, s. 7, and the Friendly Societies Act, 1896, and to *In re Sovereign Life Assurance Co.* (4)

It is not correct to say that the Court is dealing with a casus omissus; it is simply that Parliament does not concern itself with policy holders transferred to foreign companies. And see the Collecting Societies Act, 1896, s. 4.

W. P. Spens K.C. in reply.

The definition of "assurance company" in s. 1 of the Act of 1909 is extremely wide, but the word "company" by itself connotes something wider still. It is wide enough to include a body incorporated as a company by statute in Ireland.

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(1) [1929] 2 Ch. 430.

(2) Ibid. 435.

(3) 1911 S. C. 1296.

(4) (1889) 42 Ch. D. 540, 547.

Lord Hemphill for the superintendents, assistant-superintendents and agency staff of the Prudential Company in Eire.

The rest of the argument was concerned with the merits of the scheme, and its fairness to the policy holders and the staff of the Prudential Company in Eire.

1939. July 27. SIMONDS J. This is a petition of Sir Edgar Horne, Sir George Barstow and others, directors of the Prudential Assurance Company, Ld., to obtain the sanction of the Court pursuant to s. 13 of the Assurance Companies Act, 1909, as modified by s. 12, sub-s. 3, of the Industrial Assurance Act, 1923, to the transfer by the Prudential Assurance Company (which I will call "the Prudential Company") as a going concern to the Industrial and Life Assurance Amalgamation Company, Ld., of Eire, of the industrial assurance business of the Prudential Company in Eire as defined in and in accordance with the terms of a certain provisional agreement of June 9, 1939, which is scheduled to the petition. The proposal, it will be seen, is for the transfer by the Prudential Company, which is an assurance company within the meaning of the Assurance Companies Act, 1909, to a transferee company, which is not an assurance company within the meaning of the Act, of part of its assurance business.

Two questions arise for my determination. The first is whether the transfer is one which I have jurisdiction under the Act to sanction. The second question is: assuming that I have such jurisdiction, is this a case in which I ought to exercise it and sanction the transfer proposed in accordance with the terms of the agreement scheduled to the petition.

In considering the first question, which is a somewhat narrow question of construction of the Act, I want to preface my decision by this observation. I consider the construction of the Act upon the basis of the decision given by Maugham J. and Eve J. in the case of the *United British Insurance Co., Ld.* (1) In that case, following what had been said by Lord

(1) [1929] 2 Ch. 430.

SIMONDS J.

1939

PRUDENTIAL ASSURANCE CO., AND THE ASSURANCE COMPANIES ACT, 1909, AND THE INDUSTRIAL ASSURANCE ACT, 1923, *In re.*

Dunedin in the Court of Session in the *Empire Guarantee and Insurance Corporation, Ld.* (1), Eve J. expressed the opinion, "that the effect of the transfer is to relieve the transferring "company from any continuing liability towards the policy "holders. I think the matter is clearly settled by the Scottish "decision, which commends itself to my mind as being in "accordance with what the statute intended." The same case came later before Maugham J., when he said: "I have "satisfied myself that the decision in *Empire Guarantee and* "*Insurance Corporation* (1) is exactly in point, and I shall "follow that decision." The attention of the Court was not in that case called to the speech of Lord Parker in the *United London and Scottish Insurance Co.* v. *Omnium Insurance Corporation* (2), where, by way of dictum only, he said: "I, "at present, without asking your Lordships to pledge the "opinion of this House one way or the other, remain of the "opinion that the Act, which requires the consent of the "Court to an agreement for the transfer of insurance business, "does not enable the Court to do anything more than the "parties could have done for themselves but for the clause "of the Act. The Court's sanction it is true is necessary, "because there was no power to act without that sanction. "When the sanction is obtained the agreement must be "construed with reference to their own powers and must be "worked out in the ordinary way. It appears to me that "the Act does not, especially having regard to the prior Acts "of 1870 and 1872, and the particular clauses therein contained, "have the effect of creating what I may refer to as a statutory "novation of contract of the policy holders with the company "to whom the business is transferred." This dictum I must in the circumstances disregard, considering myself bound by the express decision of Eve J. and Maugham J. I think it is necessary to preface my decision by referring to that authority because it really goes to the root of the whole matter. The effect of such a transfer as this, when it has been sanctioned by the Court, is to release the transferor company and to impose a new obligation upon the transferee company.

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(1) 1911 S. C. 1296.

(2) (1915) 84 L. J. (Ch.) 777, 783.

The question which I have to determine turns upon the construction as I have said, firstly, of the Act of 1909, and then of the Act of 1923. Sect. 1 of the Act of 1909 provides, so far as is material, as follows: "This Act shall apply to all "persons or bodies of persons, whether corporate or un-"incorporate, not being registered under the Acts relating to "friendly societies or to trade unions (which persons and "bodies of persons are hereinafter referred to as assurance "companies), whether established before or after the com-"mencement of this Act and whether established within or "without the United Kingdom, who carry on within the "United Kingdom assurance business of all or any of the "following classes"—then a number of classes of assurance business are set out including life assurance business. The section ends with a provision which I do not think is really material: "A company registered under the Companies "Acts which transacts assurance business of any such class "as aforesaid in any part of the world shall for the purposes "of this provision be deemed to be a company transacting "such business within the United Kingdom." I think I need refer to no other section until I come to s. 13, which is for this purpose the most relevant section. Sub-s. 1 provides as follows: "Where it is intended to amalgamate two or "more assurance companies, or to transfer the assurance "business of any class from one assurance company to "another company, the directors of any one or more of such "companies may apply to the Court, by petition, to sanction "the proposed arrangement." Sub-s. 2 provides: "The "Court, after hearing the directors and other persons whom "it considers entitled to be heard upon the petition, may "sanction the arrangement, if it is satisfied that no sufficient "objection to the arrangement has been established." The point is clear upon the words that I have read. The jurisdiction of the Court to sanction the proposed arrangement arises in the case of a transfer of any business from one assurance company to another company. Does that mean the transfer from one assurance company to another assurance company as defined by the Act, or does it include a transfer

SIMONDS J.

1939

PRUDENTIAL ASSURANCE CO., AND THE ASSURANCE COMPANIES ACT, 1909, AND THE INDUSTRIAL ASSURANCE ACT, 1923, *In re.*

from an assurance company to any other sort of company at all? If it means the former, then, inasmuch as the proposed transferee is not an assurance company as defined by the Act, the Court has no jurisdiction. Sub-s. 4 of s. 13 provides: "No "assurance company shall amalgamate with another, or transfer "its business to another, unless the amalgamation or transfer "is sanctioned by the Court in accordance with this section." Sect. 14 provides: "Where an amalgamation takes place "between any assurance companies, or where any assurance "business of one such company is transferred to another "company, the combined company or the purchasing company, "as the case may be, shall, within ten days from the date of "the completion of the amalgamation or transfer, deposit "with the Board of Trade" certain statements which are specified in the section. I think there is no other section relevant to the matter that I have to determine until I come to s. 30. Sect. 30 is one of a number of sections each of which deals with a special class of business, and s. 30 is the section which deals especially with companies carrying on life assurance business. It provides as follows: "Where a "company carries on life assurance business, this Act shall "apply with respect to that business, subject to the following "modifications"—and amongst the modifications is sub-cl. (*d*), which is: "Where the company intends to amalgamate "with or to transfer its life assurance business to another "assurance company, the Court shall not sanction the "amalgamation or transfer in any case in which it appears "to the Court that the life policy holders representing one-"tenth or more of the total amount assured in the company "dissent from the amalgamation or transfer." I shall have a comment to make presently upon that sub-section when I come to re-consider the meaning of s. 13. I think there is nothing else in the Act of 1909 to which I need refer; and I turn to the Act of 1923 which deals specifically with industrial assurance, which is the class of business here being considered. The Industrial Assurance Act of 1923 by s. 1 limited the carrying on of industrial assurance business. It provided: "Industrial assurance business shall not be carried on except "by a registered friendly society or by an assurance company "within the meaning of the Assurance Companies Act, 1909, "which is either registered under the Companies Acts, or the "Industrial and Provident Society Acts, 1893 to 1913, or "incorporated by special Act, and a registered friendly society "which carries on such business is in this Act referred to as a "collecting society and an assurance company which carries "on such business is in this Act referred to as an industrial "assurance company." Then it goes on to define what is meant by "industrial assurance business," which, I think, for the purpose of this case I need not consider. The next section to which I need refer is s. 12, which refers to amalgamations. Sect. 12, sub-s. 3, provides as follows: "In its application to industrial assurance business the "Assurance Companies Act, 1909, shall have effect subject "to the following modifications"—and then sub-cl. (*a*) is: "The provisions relating to life assurance business shall apply "also to industrial assurance business with the substitution "of references to 'industrial assurance business' and 'the "'industrial assurance fund' for references to 'life assurance "'business' and 'the life assurance fund.'" Then sub-cl. (*e*): "On a petition under section thirteen of the said Act (which "relates to the amalgamation of companies and the transfer "of business from one company to another) the Commissioner "shall be entitled to be heard, and on any such hearing the "Commissioner may apply to the court to exercise its powers "under paragraph (*b*) of sub-section (3) of that section of "directing that the requirements of that paragraph shall be "dispensed with or modified." That matter has already come before me on a preliminary application. Then sub-cl. (*f*) is: "On any such petition, any class of persons "(including employees of any company concerned) who allege "that they are adversely affected by the amalgamation or "transfer, shall be entitled to appear and to be heard." Finally, sub-cl. (*h*) is: "The said section thirteen"—that is of the Act of 1909—"shall apply to any transfer from one company "to another, howsoever effected, of the liabilities or of any "of the liabilities arising in respect of industrial assurance "business in like manner as if such transfer were a transfer of "the industrial assurance business." The last section which has been cited to me or which I, on reading the Act, can ascertain to be in any way relevant is s. 26, sub-s. 1, of which provides: "A member of or person assured with a collecting "society or industrial assurance company shall not, except in "the case of—(*a*) as respects a collecting society, an "amalgamation, transfer of engagements or conversion into a "company under the Friendly Societies Act, 1896, or this "Act; or (*b*) as respects an industrial assurance company, "an amalgamation or transfer of business under the Assurance "Companies Act, 1909, or this Act, be transferred from the "society or company in which he was so assured so as to "become or be made a member of or be assured with any other "such society or company without his written consent," or without such other consents as are therein mentioned. It then goes on to provide that the consents are to be in the prescribed form, and provides certain other safeguards for the transferred member or policy holder. Those, I think, are the whole of the sections which are in any way relevant to the question which I have to determine.

I return to s. 13 of the Act of 1909 to consider the question which arises here. Sect. 13 deals with two things, amalgamation and transfer; and it is to be noticed that in the case of amalgamation the Act contemplates only the amalgamation of one assurance company with another assurance company. I confess that reading that in the immediate connection with "transfer" there is a bias in my mind towards the assumption that the transfer also is to be from one assurance company to another assurance company.

However that may be, I turn now to the question of what the words "to another company" must literally and grammatically mean in this connection. The use of the words "another company" imports that the transferee has characteristics in common with the transferor. If any company is intended then "another" connotes the characteristics which are common to all companies, but does not include those which are peculiar to assurance companies. But then one asks, what are the common characteristics of a company for the purpose of this section? Is incorporation under the English Companies Act or otherwise under English law an essential? Is a friendly society within the section? Is it sufficient if there is a body incorporated according to the law of the country of its being, and, if so, why is the word "company" used rather than "corporation," a more familiar word in general jurisprudence and the word which was used in s. 181 of the Law of Property Act, 1925, when it was clearly intended to comprise any body corporate, whether incorporated according to the law of this country or another? Then it may be asked, if the word is wide enough to include any foreign corporation why should the Legislature have thought fit to exclude an unincorporated body of persons when under the Act such a body can by s. 1 be an assurance company within the Act? Reading the sub-section by itself I have little doubt that the words "another company" import that the transferee company has the characteristic in common with the transferor company that it is an assurance company as defined by the Act. This view is, I think, supported by other considerations. In s. 14 the same words "another company" are used in connection with the transfer of business, and though I could not lay much stress upon it I think that the obligations thereby imposed on the transferee, or, as it is there called, the purchasing company, are more appropriate to an assurance company as defined by the Act than to any such company as would be comprised in the wider interpretation. Sect. 30 I have already referred to. In sub-s. (*d*) reference is made to "amalgamation or transfer." The section opens with the words "Where a company carries on life assurance business." It is clear that by "a company" is meant a company which is an assurance company within the meaning of the Act. Then in sub-s. (*d*) the opening words "The company" refer back to such company. The sub-section then refers to transfer "to another assurance company." I find it impossible to suppose that, in a section wherein special provisions are made applicable to life assurance companies, the Legislature intended to exclude from its purview transfers of those businesses to companies other than assurance companies, whilst safeguarding the interests of policy holders upon a transfer to an assurance company. Upon consideration then, not only of the particular section but of the whole Act, I come to the conclusion that my jurisdiction to deal with and sanction a transfer of business arises only where the transferee company is an assurance company within the meaning of the Assurance Companies Act, and that applies equally whether it is an assurance company or an industrial assurance company, and whether the class of business which is to be transferred is life assurance or industrial assurance. The Act of 1923, in my opinion, does nothing to restrict or to enlarge the jurisdiction of the Court, except that it makes specifically applicable to the case of industrial assurance the powers of the Court in regard to life assurance and other forms of assurance as given by the Act of 1909. I was asked to consider the provisions also of the earlier Acts, the Life Assurance Acts of 1870 and 1872, and the Friendly Societies Act of 1896. Without going through them I think at least they lend support to the view that the Legislature in the Act of 1909 intended to deal only with the case of the transfer to an assurance company.

Coming to that conclusion, I have no jurisdiction to sanction the proposed transfers. But obviously the matter is one of great importance and, moreover, one upon which, having regard to the hour of the day upon which it was brought before me, I have not had very much time for consideration. It may well be, therefore, that the opinion of a higher Court may be sought, and that being the case I thought it desirable to look into the merits of the proposed transfer in order that I might express an opinion upon it upon the footing that I have a jurisdiction which, in my judgment, I have not. The position there is this: The Act that I have already read provides that the Court may sanction the arrangement if it is satisfied that no sufficient objection to the arrangement has been established. I have had the advantage of the able criticism of the scheme by Mr. Blanco White on behalf of the policy holders, and by Lord Hemphill on behalf of the staff. I am satisfied that, having regard to the abnormal circumstances created by the Irish legislation, this is an arrangement which if I could I ought to sanction. I do not propose to go through the arrangement in detail or to deal specifically with the points of objection which have been taken. I will only say this: I have not been satisfied that there is any sufficient objection to the arrangement. On the contrary, I am satisfied that the directors of the Prudential in making this arrangement have done their utmost, in the difficult circumstances of the case, to do their best both for the policy holders in Eire and for their staff in that country, and I should have no hesitation in sanctioning this arrangement if I had jurisdiction to do so.

With regard to the costs of this petition it was arranged that the objectors, whom Mr. Blanco White represents, should appear at the expense of the petitioning company, and I suppose their costs will be paid by the petitioning company as between solicitor and client.

With regard to the other petitions, those of the Pearl Assurance Company, Ld., the Refuge Assurance Company, Ld., and the Britannic Assurance Company, Ld., in each case I dismiss the petition, in each case holding that I have not got jurisdiction to sanction the transfer, in each case saying that if I had such jurisdiction I should sanction the transfer. In each case, therefore, the petition will be refused with no order, other than that the costs of the Commissioner be paid.

Solicitors: *C. Howe Browne; Slaughter & May; The Treasury Solicitor; Linklaters & Paines; William Charles Crocker.*

H. L. L.

SIMONDS J.

1939

July 28.

ATTORNEY-GENERAL *v.* FINSBURY BOROUGH COUNCIL.

(1939. M. 2318.)

Local Government—Air Raid Precautions—Deep shelter—Scheme of Metropolitan Borough Council disapproved by Minister—Proposed grant of building lease of part of clearance area to a company—Company to construct underground shelter and relet to Council—Validity—London Government Act, 1899 (62 *&* 63 *Vict. c.* 14)—*Housing Act,* 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 51)—*Air Raid Precautions Act,* 1937 (1 *&* 2 *Geo.* 6, *c.* 6), *ss.* 1, 3, 7.

A Metropolitan Borough Council prepared and submitted to the Secretary of State, for his approval, a scheme for the construction in their area of a number of deep underground bomb shelters, under the Air Raid Precautions Act, 1937, s. 1. The scheme was rejected on technical grounds.

The council proposed, however, to proceed with their scheme independently of their powers under the Act of 1937, and to build one shelter under a clearance area which they had acquired under the Housing Act, 1936. They negotiated a lease to a company of the central portion of the area, around which they proposed to erect blocks of flats, for a term of forty years at a nominal rent. The company were to construct the shelter in accordance with the plans at a cost of about 80,000*l.*, and then to let or hire it to the council for thirty-eight years at a rent made up of (1.) 50*l.* (2.) interest on the total cost at $5\frac{7}{8}$ per cent. per annum, and (3.) an annual sum for amortization of the capital at the rate of $2\frac{1}{2}$ per cent. per annum, making a total of 7400*l.* a year, with an option to the council to purchase the lease.

In an action brought by the Attorney-General, at the relation of a ratepayer, who contended that the scheme was ultra vires the council:—

Held, (1.) that the letting of the property by the council to the company, although only part of a larger transaction, was authorized by s. 30 of the Housing Act, 1936; (2.) that the scheme was not one which involved the unauthorized borrowing of money, but was a contract to pay for the work done by annual instalments over a term of years, which the council were entitled to do; (3.) that the agreement under which the council were to rent the shelter was not unauthorized, the council having power under s. 5, sub-s. 2, and Part II. of the Second Schedule to the London Government Act, 1899, to acquire and pay for the land on which the shelter was constructed, for the purpose of the powers or duties of the council.

Held, therefore, that the scheme was intra vires the council and the action failed.

SIMONDS J.

1939

ATTORNEY-GENERAL v. FINSBURY BOROUGH COUNCIL.

MOTION.

The plaintiff suing at the relation of Ernest Elton Martin, a ratepayer of Finsbury, claimed (1.) a declaration that an agreement proposed to be entered into between the Finsbury Borough Council and Shop Investments, Ld., whereby (*a*) the council agreed to demise a piece of land in Busaco Street, Pentonville, in the borough of Finsbury, to Shop Investments, Ld.; (*b*) Shop Investments agreed to construct in or under the land an air raid shelter; and (*c*) Shop Investments, Ld., agreed to redemise the said piece of land and shelter to the defendant council for a term of thirty-eight years at a rent of 7400*l.* a year, was ultra vires the defendants; (2.) an injunction to restrain the defendant council from entering into such agreement and accepting any such lease as aforesaid; (3.) an injunction to restrain the defendant council from letting or otherwise dealing with the said piece of land otherwise than in accordance with s. 30 of the Housing Act, 1936.

The defendants in 1938 prepared a scheme for the construction of fifteen air raid shelters in their borough area, at a total cost of 1,387,760*l.* The scheme was submitted to the Lord Privy Seal for his approval, but that was refused on April 18, 1939. The Borough Council did not accept this rejection of their plans, as they were not satisfied that proper protection could otherwise be given to the area on the ground that it was a congested area, very deficient in basements and open spaces. The day-time population was estimated at 142,225, while the night-time population was 55,040.

The defendants therefore caused plans to be prepared for a deep air raid shelter at Busaco Street, Finsbury, on part of a clearance area, under the Housing Act, 1936, amounting to 2463 square yards. They proposed to build blocks of flats around the outside and construct a deep air raid shelter under the land in the centre, which would be left a vacant space for that purpose. They submitted these plans to the Minister of Health for his approval under s. 7, sub-s. 3, of the Air Raid Precautions Act, 1937. The Minister of Health replied that he could not sanction any loan for the estimated cost of these works until the Lord Privy Seal had approved the proposals. On June 13, 1939, the defendants informed the Air Raid Precautions Department of the Home Office of the result of their application to the Minister of Health and asked for the approval of the Lord Privy Seal to the plans and specifications. The Lord Privy Seal refused to approve them.

The defendant council then proposed to find a means of carrying out their plans for the shelter at Busaco Street, without the necessity of obtaining a loan. They proposed to enter into an agreement with a company, Shop Investments, Ld., under which (*a*) a building lease of the site, half an acre, would be granted to the company for a term of forty years, at a rent of 50*l*. a year in consideration of the construction by the company of an air raid shelter to accommodate about 7500 persons at a cost of 80,000*l*., plus 15 per cent. for architects and other fees; (*b*) the company should as soon as the work was finished relet the land and the shelter to the defendants for thirty-eight years at a rent calculated to produce (i.) the 50*l*. a year; (ii.) interest at the rate of 5⅞ per cent. on the total expenditure; (iii.) amortization of the capital cost at the rate of 2½ per cent. per annum.

Under s. 62 of the Civil Defence Act the defendants can use any of their lands for the purpose of discharging any of their functions under the Act, but such powers are only exercisable with the approval of the Minister and subject to any conditions which he may impose. The defendants said they were not exercising any of the powers of the Act. The defendants submitted that the letting was authorized by the Housing Act, 1936 (1), that the expenditure was authorized

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(1) Housing Act, 1936 (26 Geo. 5 & 1 Edw. 8, c. 51), s. 30: "(1.) "A local authority who have under "this Part of this Act purchased "any land comprised in, or surrounded by, or adjoining, a "clearance area shall, as soon as "may be, cause every building "thereon to be vacated and, subject to compliance with any "provision contained in a compulsory purchase order with "respect to the carrying out of "re-housing operations, shall deal "with that land in one or other of "the following ways, or partly in "one of these ways and partly in "the other of them, that is to "say—

"(*a*) they shall demolish every "building thereon before the expiration of six weeks from the "date on which it is vacated, or "before the expiration of such "longer period as in the circumstances they shall deem reason-by s. 7, sub-s. 1, of the Air Raid Precautions Act, 1937 (1), and that the scheme did not involve any borrowing by them. They further submitted that there was power given them to take a lease of the site and shelter under s. 65 of the Local Government Act, 1888, as applied by s. 5, sub-s. 2, and Part 2 of the Second Schedule to the London Government Act, 1899,

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"able, and thereafter may sell "or let the land subject to such "restrictions and conditions, if "any, as they think fit, or may, "subject to the approval of the "Minister, and subject to the like "restrictions as are contained in "s. 163 of the Local Government "Act, 1933, with respect to the "appropriation of land by local "authorities under that section, "appropriate the land for any "purpose for which they are "authorised to acquire land. . . .

"(2.) Land sold, exchanged or "leased under this section shall be "sold, exchanged or leased at the "best price, for the best consideration, or for the best rent, "that can reasonably be obtained "having regard to any restriction "or condition imposed."

(1) Air Raid Precautions Act, 1937 (1 & 2 Geo. 6, c. 6), s. 1: "(1.) It shall be the duty of the "local authorities hereafter in this "section respectively mentioned "to submit to the Secretary of "State schemes (hereinafter referred to as 'air-raid precaution "'schemes') making provision as "to the arrangements to be made "in their several areas for the protection of persons and property "from injury or damage in the "event of hostile attack from the "air, and as to the authorities and "persons by whom such arrangements are to be carried out."

Sect. 3: "(1.) The Secretary of "State may approve, with or without modifications, any air-raid "precaution scheme submitted to "him under this Act, and any such ,,scheme, shall, upon being so approved, come into force on such "date as may be provided by the "scheme as approved.

"(2.) It shall be the duty of "every local authority to discharge such functions as may be "imposed on the authority by "this Act or by any scheme in "force thereunder."

Sect. 7: "(1.) Any local authority may incur expenditure for the "purpose of making provision for "the protection of persons and "property from injury or damage "in the event of hostile attack "from the air whether or not such "expenditure is incurred in pursuance of an air-raid precaution "scheme.

"(3.) For the purposes of defraying any expenditure of a metropolitan borough council under "this Act, the council may borrow "money in accordance with and "subject to the provisions of the "Metropolis Management Acts, "1855 to 1893, as amended by the "London Government Act, 1899.

"Provided that the Minister of "Health shall, instead of the "London County Council, be the "authority for sanctioning the "borrowing of any money under "the powers conferred by this "section, except where those "powers are exercised with "respect to land . . . . for which "money has been or may be "borrowed with the consent of the "London County Council under "some other Act."

and that the rent payable was not unreasonable, as the scheme could not be carried out on cheaper terms.

R. O. Wilberforce for the plaintiff.

The scheme of the defendant council is ultra vires and void on several grounds. It is a scheme to provide a shelter from hostile attack from the air and the only proper way of doing this is under the Air Raid Precautions Act, 1937, subject to the approval of the Minister for Civil Defence, and that approval has been refused for this scheme.

The defendant council are purporting to act under the powers of the Housing Act, 1936. It is submitted that this is not a letting of the land in any real sense at all. The council only get the nominal rent of 50*l.*, and that is never paid, because the first thing they have to do under the demise or hiring of the shelter to them is to repay the 50*l.*, together with a rent which works out at present at 7400*l.* a year. The letting, having regard to the sub-demise, is not one that can be brought within s. 30 of the Housing Act, 1936. Financially this is an unauthorized borrowing by the council of 80,000*l.* at a much higher rate of interest than an approved loan would bear. The power of borrowing money for air-raid precaution schemes can only be exercised subject to the consent of the Minister of Health: see Air Raid Precautions Act, 1937, s. 7.

The only function of Shop Investments, Ld., is to raise the capital cost of this shelter and lend it to the council at 5⅞ per cent. The company have no rights whatever under this agreement except to receive interest on their capital. A supplemental agreement was entered into to protect the company from possible increased demands for income tax under Schedule A. The affidavits filed on behalf of the council show how they treated the matter; they refer to the financial terms which they have been able to obtain. The council admit that it was quite impossible for them to borrow money for their scheme on the usual terms, and therefore they have to pay a higher rate of interest.

The duty of the council is to submit schemes for the approval of the Minister, and if approved to carry them out. Under the Air Raid Precautions Act, 1937, s. 7, sub-s. 1, the council have power to incur expenditure, but they cannot lease land merely for the purpose of incurring expenditure by payment of rent. This is not a proper exercise of their powers of obtaining land under the London Government Act, 1899.

A. M. Trustram Eve K.C., *Erskine Simes* and *L. M. Jopling* for the defendants. The council have power to borrow money for any of its public purposes, and they run the risk of having their expenditure disapproved of by the district auditor.

But this is not a contract for the borrowing of money. It is an agreement carrying out a common method of financing the building of blocks of flats in London ; a convenient way of obtaining finance without borrowing any capital. The interest and ultimately the capital will be repaid out of the rates. The Minister of Health, when he approves the scheme, will not be approving any expenditure under the Air Raid Precautions Act, 1937.

Under s. 30 of the Housing Act, 1936, we are given power to let this vacant land, part of a clearance area, subject to such conditions and restrictions as we think fit, and at the best rent we can obtain. There is evidence that having regard to the special conditions 50*l*. a year is the best rent we can obtain.

In form and substance it is a lease of land for forty years, and a lease to the council of the shelter, when constructed, for thirty-eight years, and during construction the company have actual possession of the property.

The defendants have no powers or duties under the Air Raid Precautions Act, when their particular scheme has been disapproved by the Government. The company does the work and takes the risk of getting the cost back. It is a spending of money, but not of borrowed money. The safeguard of the ratepayers is the district auditor.

Except as decided in *Roberts* v. *Hopwood* (1), where the expenditure is utterly unreasonable, there is no limit to the amount which a local authority may spend out of the rates, and here there is no charge on the rates.

R. O. Wilberforce replied.

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(1) [1925] A. C. 578.

SIMONDS J.
1939
Attorney-General v. Finsbury Borough Council.

Simonds J. In this case the Attorney-General at the relation of Mr. E. E. Martin, a ratepayer of the Borough of Finsbury, moves to restrain the Mayor, Alderman and Burgesses of the Borough of Finsbury from entering into an agreement with a company called Shop Investments, Ld., the purport of which is set out in the notice of motion. [His Lordship read the notice and proceeded :]

The genesis of the action is this. Sect. 1 of the Air Raid Precautions Act of 1937 imposed upon local authorities the duty of making provision as to arrangements to be made in their several areas for the protection of persons and property from injury or damage in the event of hostile attack from the air. Sub-sect. 3 provides for air raid precautions schemes being prepared by the local authorities and being submitted to the Secretary of State for his approval.

Pursuant to that obligation the defendant authority prepared a scheme for constructing fifteen underground air raid shelters, at a total cost of over 1,300,000*l.*, to afford protection for the residents and workers in the local authority's area, the Borough of Finsbury. That scheme was submitted to the Secretary of State in accordance with the Act ; and the Lord Privy Seal, upon whom the duty laid upon the Secretary of State by the Act fell, refused to approve it, for reasons which he gave. The defendant authority considered that refusal and the reasons given for it, and were not satisfied. They determined, notwithstanding the rejection of their proposals, to go on with it, if they could lawfully do so. So far, at any rate, as part of the scheme is concerned, they devised—and I use the word without any offence—a scheme by which they could make, and have available for the inhabitants of their area, a deep shelter upon a certain site in Busaco Street mentioned in the notice of motion. They resolved, if possible, to construct one of the shelters within the clearance area in the neighbourhood of Busaco Street. They submitted plans, specifications and bills of quantities to the Minister of Health ; and requested him to authorize a loan for the estimated cost thereof under s. 7, sub-s. 3, of the Air Raid Precautions Act. Sub-sect. 1 of s. 7 of the

Act provides: "Any local authority may incur expenditure "for the purpose of making provision for the protection of "persons and property from injury or damage in the "event of hostile attack from the air whether or not such "expenditure is incurred in pursuance of an air raid pre-"cautions scheme." I call attention to those words. The power of the local authority is clear—it may incur expenditure for the protection of persons and property within its area, notwithstanding that such expenditure is not incurred in pursuance of an air raid precautions scheme. Sub-sect. 3 of s. 7 provides: "For the purposes of defraying any expenditure "of a metropolitan borough council under this Act, the "council may borrow money in accordance with and subject "to the provisions of the Metropolis Management Acts, 1855 "to 1893, as amended by the London Government Act, "1899." Then there is a proviso "the Minister of Health "shall, instead of the London County Council, be the authority "for sanctioning the borrowing of any money under the "powers conferred by this section," with certain exceptions which are immaterial. Accordingly, it was under that section that application was made to the Minister of Health to approve the expenditure in regard to air raid shelters, which the local authority as above indicated considered necessary. That sanction was refused by the Minister of Health.

The local authority, however, as they were entitled to do, still adhered to the view that their scheme was a proper one, and that it was their duty to carry it out, if they lawfully could, for the benefit of the inhabitants of Finsbury. Accordingly they embarked upon this transaction, the validity of which is challenged by the plaintiff.

The scheme is this. They have purported to enter into an agreement, if they can lawfully do so, with the company that I have named, Shop Investments, Ld., under which they will grant to the company a parcel of land, which is part of a clearance site under the Housing Act, 1936, with a full right for the company to enter upon it, with certain reservations which are not material; and the company is bound forthwith to begin and arrange for the excavation and construction under the land of a shelter. That shelter is to be erected in accordance with the directions and subject to the supervision at all points of the council. The building contract is described in the agreement, and its contents are prescribed. Then there is a provision in cl. 22 as to what is to happen on the outbreak of war, a clause which in effect enables the council to re-enter upon the land, and authorizes the company to stop work upon it. Then it is provided by cl. 23: "If and when the said "shelter to be comprised in the lease shall have been entirely "finished and completed in accordance with the provisions" contained in the agreement, the council is to grant and the company is to take a lease, the form of lease being set out in the schedule to the agreement. It is provided that, upon the completion of the shelter, the company shall let and the council shall take on hire the said shelter for a term of thirty-eight years from the quarter-day immediately preceding the date certified as the date of the completion of the shelter, in consideration of annual payments to be calculated in accordance with the provisions thereinafter set out. I will just refer to the rent under the lease to be granted under this agreement by the council: the company are to pay a rent of 50*l.* and the term is to be for forty years.

Contemporaneously, as I have said, with the grant of the lease there is to be what is called a hiring of the shelter to the council; and the terms of that are set out in the second schedule to the agreement. It is only material to observe that the payment is to be the rental of 50*l.* together with interest at the rate of $5\frac{7}{8}$ per cent. of the capital cost of the shelter to be constructed on the land, and the annual amount required for amortization of the aforesaid capital cost calculated at the rate of interest of $2\frac{1}{2}$ per cent. per annum.

That being the agreement which they have entered into, the validity of it is challenged on numerous grounds. In the first place, it is said that the leasing by the defendant authority to the company is not authorized by the relevant section, s. 30, of the Housing Act, 1936, under which alone the defendant authority have purported to grant the lease. Sect. 30 of the Housing Act, 1936, provides what a local authority may do, when it has declared an area to be a clearance area within the meaning of Part III. of the Act. It enacts that the local authority who have under this part of this Act "purchased "any land comprised in, or surrounded by, or adjoining, a "clearance area shall, as soon as may be, cause every building "thereon to be vacated," and subject to compliance with any provision contained in the compulsory purchase order with respect to the carrying out of re-housing operations, shall deal with that land in one or other of the following ways, or partly in one of these ways and partly in the other of them, that is to say: first of all they must demolish the buildings and thereupon one of two alternatives is open to them. They may either sell or let the land, subject to such restrictions and conditions, if any, as they think fit, or may, subject to the approval of the Minister and subject to the like restrictions as are contained in s. 163 of the Local Government Act, 1933, with respect to the appropriation of land by Local Authorities under that section, appropriate the land for any purpose for which they are authorized to acquire land. What the local authority here propose to do is to avail themselves of the first of those two alternatives, and to let the land subject to such restrictions as they may think fit. It is a condition of the validity of such a lease that it is to be at the best rent that can reasonably be obtained, having regard to any restrictions imposed.

I think the simple question that I have to decide is whether the lease which, in pursuance of this agreement, if they can lawfully make it, the local authority propose to grant is a letting within the meaning of s. 30 of the Act of 1936. I do not find it possible to say that it is not. I think, notwithstanding that the agreement provides first for a lease and secondly for what is called a hiring of the shelter which is to be erected under the terms of the agreement, that this is in substance, as it is in form, a letting of the clearance area, or so much of it as the local authority think fit to let. It is quite true that the letting itself is part of a larger transaction; and I shall have to investigate the validity of the other part of that transaction; but I think this is in substance, as it certainly is in form, a letting of the clearance area. Therefore, upon the first ground, the objection to the validity of that part of the agreement which consists in the agreement to let, so far as it goes, I think, fails.

The next point I have to consider is this. It will have been observed from the sub-section to which I have already called attention that if for the purposes of any expenditure under s. 7 of the Air Raid Precautions Act it is necessary to borrow money, then the consent of the proper Minister has to be obtained. This transaction as a whole has been challenged on the ground that, although upon the face of it the local authority will do no more than pay a rent under the hiring agreement, the subject of the present agreement, yet in substance what they are doing is to borrow money. In my view that objection also fails. What the local authority are doing is to bind themselves to pay a certain sum from year to year. That sum they will pay out of revenue, that is to say out of rates or the rate fund. That is an obligation which, as it appears to me, they are at liberty to enter into. It is just as if they had agreed to purchase something which they did not think fit to pay for, or perhaps were not able to pay for, in one year, and by agreement between themselves and the vendor agreed that it should be paid by instalments over a series of years. As I understand the law there can be no objection to that. It is, of course, quite true that the District Auditor may challenge such payment if for any reason he thinks it is challengeable. But it is not a borrowing of money which requires for the safeguarding of the ratepayers the previous sanction of some other authority.

Accordingly, although it is quite true that this is a financing by a third party of expenditure which the local authority has incurred, it cannot be said, in my view, that the local authority are borrowing so as to require the previous sanction of the Minister under the provisions of the Air-Raid Precautions Act. They are incurring expenditure which falls within that section and they are incurring that expenditure out of the rates of this and future years but are doing so without borrowing money.

The third objection which was taken to this transaction is this. It is said that the hiring agreement which is an integral part of the purchase agreement, that is to say, the agreement under which the local authority is to rent the shelter when it has been constructed, is unauthorized. On that the local authority can call in aid s. 5, sub-s. 2, of the London Government Act, 1899, which provides that "As from the "appointed day the powers of the London County Council "under the enactments mentioned in Part Two of the Second "Schedule to this Act may, subject to the conditions mentioned "in that schedule, be exercised also by each borough council "as respects their borough." The second part of the Second Schedule so far as it is relevant to boroughs is, that this power of the county council may be exercised by the borough council under powers under s. 65 of the Local Government Act, 1888, which section relates to the acquisition of land; that is an acquisition either by purchase or by lease. The condition of exercise prescribed by the same part of the same schedule is: "The power to be exercised only where the "land is required for the purpose of any of the powers or "duties of the borough council." The power, if not the duty, of the borough council under s. 7 of the Air Raid Precautions Act, which I will read once again, is: "Any local authority "may incur expenditure for the purpose of making provision "for the protection of persons and property from injury or "damage in the event of hostile attack from the air." For the purpose of making that provision this local authority deem it expedient to acquire a certain shelter. Accordingly it seems to me that they must be justified, in order to make that provision, in acquiring the land in the way in which they think expedient. They think it expedient to do so by taking a lease of or renting this particular shelter. It follows that they must pay the rent which, as a matter of bargain, has to be paid for the renting of that particular shelter, and it appears to me that in doing so they are acting within the powers of the London Government Act of 1899, s. 5, as applicable to this particular case.

Accordingly, I think that upon all the points the objection

SIMONDS J.

1939

ATTORNEY-GENERAL *v.* FINSBURY BOROUGH COUNCIL.

taken on behalf of the plaintiff fails and that I must refuse this motion.

Subject to the consent of the Attorney-General being obtained the motion was treated as the trial of the action. The action, therefore, was dismissed, but the defendant council did not ask for costs, and no order was made as to costs.

Solicitors: *F. Basil Guedalla; J. E. Arnold James, Town Clerk, Finsbury.*

H. L. L.

In re DARBY.

RUSSELL *v.* MacGREGOR.

C. A.
1939
May 11, 12.

[1938. D. 952.]

Will—Residuary legatee—Annuity out of residue—Settlement under residuary legatee's will—Tenant for life and remainderman—Capital and income—Incidence of annuity.

A testator by his will left his residue to his daughter absolutely, but subject to and charged with her paying to his wife, in each year during his wife's life, such a sum as would, with the income received by his wife during that year from all sources, make up 3000*l.* a year free of income tax and super-tax. He died two years later, survived by his wife and by his daughter, who carried out the terms of his will.

Ten years after his death the daughter by her will directed her trustees from the income of her residue (inter alia) to make up her mother's income during her life to such a sum as, after deducting income tax and sur-tax, would leave a net annual sum of 4000*l.*, and to pay the balance of the income of the residue (after all other payments which she directed to be made out of it) to M. for life. The daughter directed also that, subject to the foregoing trusts, her trustees should stand possessed of the capital and income of her residuary estate in trust for M.'s issue as in the will directed, and, if that trust failed, in trust for B. and W. as therein directed. The daughter died the same year, survived by her mother, by M., who had no children, and by B. and W., who were infants.

On the question arising how the obligation imposed by the testator's will ought to be dealt with as between the capital and the income of the daughter's estate, the trustees of the daughter's will issued a summons to determine (inter alia) whether the annuity ought to be paid (*a*) wholly out of the capital, or (*b*) wholly out of the income, or (*c*) partly out of the capital and partly out of the income of the daughter's residue; and (3.) if the answer to (2.) (*c*) was in the affirmative, whether each instalment of the annuity ought to be apportioned so that (*a*) such a sum was paid out of capital as would, if invested at the date of the daughter's death, have produced, with simple interest at 4 per cent., the instalment, and the residue was paid out of income; (*b*) some other and what proportions were paid out of capital and income respectively:—

Held, by the Court of Appeal, affirming the decision of Farwell J., with a slight variation, (1.) that, as there was no personal covenant to pay the annuity charged by the testator's will, the liability to pay it could not, in the administration of his daughter's estate, be treated as if it had been a liability to pay an annuity in respect of which she herself had entered into a personal covenant. The liability owed its origin not to a personal covenant by her but to a charge created by the testator's will.

In re Perkins [1907] 2 Ch. 596, and *In re Poyser* [1910] 2 Ch. 444, distinguished.

(2.) That the testator had made an absolute and out and out gift to the daughter, and the fact that that gift was, under the terms of his will, made subject to and charged with her paying the annuity to the mother did not impose on her any personal liability to pay it to her.

In re Williames (1885) 52 L. T. 41; (1886) 54 L. T. 105, distinguished.

(3.) That the rule in *Allhusen* v. *Whittell* (1867) L. R. 4 Eq. 295, did not apply. Its purpose was to effectuate any equitable arrangement which a testator, in making his dispositions, might be presumed to have had in mind. It could be displaced by clear language in the will, and was inapplicable where the nature and circumstances of property precluded its correct application. It contemplated that a periodical payment under a covenant would be paid, when due, partly out of income and partly out of capital: and, in the present case, it was only with the mother's consent that any particular payment could so be made to her. The daughter must be taken to have known, when settling her residue (which included property representing the testator's residue), what her mother's rights were; and she could not be taken to have intended that the annuity should be paid in a manner in which it could not be paid without the mother's consent.

In re Popham (1914) 111 L. T. 524, followed.

In re Thompson [1908] W. N. 195, distinguished.

APPEAL from the decision of Farwell J.

By his will dated December 28, 1923, Alfred Edmund William Darby (hereinafter called "the testator"), after bequests and legacies not here material, left his residue to his daughter, Mrs. Frances Muriel Cope Darby, absolutely, but subject to and charged with the payment by her to his wife, Frederica Louisa Juliana Darby, in each year during the wife's life of such a sum as would, with the income received by the wife during that year from all sources, make up 3000*l.* free of income tax and super-tax.

The testator died on July 23, 1925, survived by his wife and also by his daughter, who carried out the terms of his will.

By her will dated August 3, 1935, the daughter (hereinafter called "the testatrix"), after bequests and legacies not here material, directed her trustees out of the income of her residue (inter alia) to make up her mother's income during her life to such a sum as, after the deduction of income tax and sur-tax, should leave a net sum of 4000*l.* per annum, and to pay the balance of the income of the residue (after all other payments which she directed to be made out of it) to Rachel MacGregor during her life. The testatrix further directed that, subject to the foregoing trusts in her will, her trustees should stand possessed of the capital and income of her residue in trust for Rachel MacGregor's issue as in the will directed and, on the failure of that trust, in trust for James Christy Brownlow and Gillian Mary Wolryche-Whitmore as in the will directed. She died on September 12, 1935, survived by her mother (hereinafter called " the annuitant "). Rachel MacGregor had no children, and at the date of the daughter's death James Christy Brownlow and Gillian Mary Wolryche-Whitmore were infants.

The question arose how the obligation imposed by the testator's will ought to be dealt with as between the capital and income of the estate of the testatrix ; and the trustees of her will issued a summons to determine (inter alia) (1.) whether the annuitant's income which the testatrix by her will directed to be made up to 4000*l.* free of income tax and sur-tax included the annuity in the annuitant's favour subject to and charged with the payment of which the testator's residue was given by his will to the testatrix, and which formed part of the estate of the testatrix at her death ; (2.) if the answer to question (1.) was in the affirmative, whether the annuity ought to be paid (*a*) wholly out of the capital, or (*b*) wholly out of the income, or (*c*) partly out of the capital and partly out of the income of the residue of the testatrix ; and (3.) if the answer to (2.) (*c*) was in the affirmative, whether each instalment of the annuity ought to be apportioned so that (*a*) such a sum was paid out of the capital as would, if invested at the date of the death of the testatrix, have produced, with simple interest at 4 per cent., the instalment, and the residue was paid out of income ; (*b*) some other and what proportions were paid out of capital and income respectively. The defendants to the summons were Rachel

MacGregor, James Christy Brownlow, and Gillian Mary Wolryche-Whitmore.

Farwell J. held: (1.) that, on the true construction of the will of the testatrix, the annuitant's income which the testatrix by her will directed to be made up to 4000*l.*, included the annuity in the annuitant's favour subject to and charged with the payment of which the testator's residue was given by his will to the testatrix, and which formed part of the estate of the testatrix at her death; (2.) that the annuity was payable primarily out of the income of the testator's residuary estate, with the right to resort to capital if the income should be insufficient to pay the amount required, and that the amount necessary in each year to make up the annuitant's income to a net sum of 4000*l.* per annum as directed by the will of the testatrix was payable wholly out of the income of the residuary estate of the testatrix.

The order directed that the costs of the plaintiffs and defendants be taxed as between solicitor and client, and paid out of the residuary estate of the testatrix.

The defendant Rachel MacGregor appealed against the second part of the decision. The defendants James Christy Brownlow and Gillian Mary Wolryche-Whitmore cross-appealed against the first part.

The Court of Appeal, after hearing argument, dismissed the cross-appeal and heard argument on the main appeal.

J. Neville Gray K.C. and *J. G. Strangman* for the appellant Rachel MacGregor. In view of the decision as a matter of construction that the direction in the will of the testatrix that the annuitant's income should be made up to 4000*l.* applied only to the income when already made up to 3000*l.* under the direction in the testator's will, the question arises how as between capital and income the amount payable under the testator's will is to be provided. The testatrix had the residue of the testator's estate vested in her charged with the liability to make up the annuitant's income to 3000*l.*, and that residue as so charged passed with her free estate under her will. The Court here is not administering the estate of the testator but that of the testatrix, and there must be an adjustment between capital and income in paying the annuitant's annuity consisting of increasing the income to 3000*l*. This is not a case where a fund has been set aside to answer the mother's annuity, but the testator's estate was vested in the testatrix subject to the burden of the annuity charged thereon. It is a charge on the whole residuary estate, capital and income, and resembles the liability imposed when a testator has covenanted by deed to pay an annuity, and comes within the principle of *Allhusen* v. *Whittell* (1) as extended by later cases. It is true that the testator's will excluded the application of *Allhusen* v. *Whittell* (1), but what is here material is its application to the estate of the testatrix. The annuity was as regards the testator bounty, but as regards the estate of the testatrix a liability. In *Allhusen* v. *Whittell* (1) it was decided that the immediate debts of a testator were to be treated as paid out of so much of the capital as with one year's income arising therefrom sufficed to pay the debts. That rule has been extended to future debts, and in particular to the case where a testator has during his lifetime covenanted to pay an annuity, and each year's annual sum has to be provided out of so much capital as with the income thereof down to the time of payment is sufficient to pay it: *In re Perkins* (2); *In re Poyser* (3); and see also *In re Harrison.* (4) It is contended that the same principle applies here, although the annuity became payable as a result of the testator's exercise of his bounty. It is none the less a liability of the estate of the testatrix. This is not the case of a contingent legacy but of a legacy of unascertained amount, and the principle is applicable: *In re Thompson.* (5) There is no real ground of distinction between this case and the case where the liability to pay the annuity resulted from a covenant of the testator. It is true that the annuitant is here entitled primarily to have the annuity paid out of income so that the matter would be one for adjustment after her death unless the annuitant consented

(1) (1867) L. R. 4 Eq. 295.
(2) [1907] 2 Ch. 596.
(3) [1910] 2 Ch. 444.
(4) (1889) 43 Ch. D. 55.
(5) [1908] W. N. 195.

C. A.
1939
DARBY,
In re.
RUSSELL
v.
MACGREGOR.

to be paid in accordance with the rule. The order the Court is asked to make applying the rule could be made without prejudice to the annuitant.

The testator's will could be read as treating this primarily as a burden on income. But the Court will not, having regard to its decision on the first point, do that as a matter of construction. If a sum had been set aside in the administration of the testator's estate some time ago, it might have made a difference: if it was done now, it would not make a difference, because the question is, what came into the estate of the testatrix? This is, in the circumstances, a personal liability on the testatrix to keep down the annuity. It is a case, not of her being a life tenant, but of the testator's having deliberately imposed on her, in giving her his bounty, an obligation to pay the annuity. The liability must therefore be a liability of her estate, which must be considered in applying the rule in *Allhusen* v. *Whittell* (1); and *In re Perkins* (2) and *In re Poyser* (3) are analogous cases. The authorities show that originally, with regard to liabilities of this sort, there was a distinction between the liability of a tenant for life as such and a liability imposed by will on a tenant for life: *In re Williames.* (4) Under the testator's will the testatrix is in effect trustee and beneficiary, and there is a quasi-contractual relationship between her and the annuitant. [They referred to *Blackmore* v. *White* (5); *Jay* v. *Jay* (6); *In re Field.* (7)]

Under the testator's will she is liable because she has made herself a trustee. The liability is for the annuitant's benefit just as, in *In re Williames* (4), it was for the remainderman's benefit. It is sufficient, however, to rely on her liability as a trustee. Had she disposed of the properties, she would have been liable personally. Thus, the liability is not merely a liability of the estate. The annuity, although primarily payable out of income, was a charge or burden on the whole

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(1) L. R. 4 Eq. 295.
(2) [1907] 2 Ch. 596.
(3) [1910] 2 Ch. 444.
(4) (1885) 52 L. T. 41; (1886) 54 L. T. 105.
(5) [1899] 1 Q. B. 293.
(6) [1924] 1 K. B. 826, 830.
(7) [1925] Ch. 636.

C. A.
1939
DARBY,
In re.
RUSSELL
v.
MACGREGOR.

estate. The position is thus similar to, if not identical with, that in *In re Poyser.* (1) The testatrix cannot have intended her will to be interpreted according to some principle adopted in the administration of the testator's estate. That estate came to her hands absolutely, but subject to a liability or burden. If a fund is set aside to satisfy the annuity, Rachel MacGregor is entitled to apportionment, under *In re Chesterfield's* (*Earl of*) *Trusts* (2), when the reversion falls in. The order of Farwell J. precludes that; and the Court ought to declare that the testatrix had a reversionary interest which, prima facie, should be sold, but, if it is not sold, should be apportioned when it falls in.

The question falls into two parts: first, is there any room for the rule in *Allhusen* v. *Whittell* (3), and secondly, if there is, is there any evidence of the intention of the testatrix to exclude it? After the testator's death she could have disclaimed the burden, had she regarded it as too onerous. The bequest was conditional and, by accepting it, she elected to fulfil the conditions. After she so elected, her liability was unlimited. She chose to break the terms of the testator's will with regard to trusts and trustee securities. She could not, therefore, in any circumstances, have been heard to say, against the annuitant, that, owing to the deficiency of the funds in her hands, she was not liable. She had, thus far, transformed the burden into a personal liability.

In re Thompson (4) ought not to be disturbed. It is exactly in pari materia to the present case.

H. B. Vaisey K.C. and *G. A. Rink* for the appellants James Christy Brownlow and Gillian Mary Wolryche-Whitmore. [They referred to *In re Oliver.* (5)] In the testator's will the words "by her," in the phrase "subject to and charged with "the payment by her" merely indicate that the estate is to be placed in the hands of the testatrix. They create a charge and nothing else. There is no personal obligation on which the testatrix could be directly sued. [They referred to *In re*

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(1) [1910] 2 Ch. 444.
(2) (1883) 24 Ch. D. 643.
(3) L. R. 4 Eq. 295.
(4) [1908] W. N. 195.
(5) (1890) 62 L. T. 533.

C. A.
1939
DARBY, *In re.*
RUSSELL *v.* MACGREGOR.

Owen (1) and *In re Muffett.* (2)] Thus, there is no room for the application of the rule in *Allhusen* v. *Whittell.* (3) The charge under the testator's will is a charge on income. There is no room for apportionment between tenant for life and remainderman. The case is governed by *In re Popham.* (4)

J. Neville Gray K.C. in reply.

R. H. Hodge for the trustees of the will of the testatrix.

SIR WILFRID GREENE M.R. The question raised by the main appeal now falls for determination.

The testatrix, Mrs. Cope Darby, at the time of her decease was in possession of the residuary estate of her father or the property which represented that estate. By his will she had taken that estate subject to and charged with the payment by her to the testator's widow of an annual sum necessary to make the widow's income up to 3000*l.* a year. By her own will she disposed of the whole of her estate, which included the testator's residuary estate subject to that charge, and by her will, as appears from the judgment already delivered on the cross-appeal, she added to her mother's income and provided that that addition should come out of the income of her estate. So far as that gift is concerned, there is no question as to the source from which the periodical payments will fall to be made ; they will be paid out of income according to her directions and there will be no right in the persons entitled to the income of her estate subject to that payment to call for a contribution from capital.

The question which arises here relates to that portion of her estate which represents the residuary estate of the testator which was charged under his will with the annuity in favour of his widow. The testatrix settled her residuary estate, and the question that now arises is whether as between the life tenant and those interested in the capital of her estate there ought to be, so far as regards that part of her estate which represents the testator's residue, an adjustment as between

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(1) [1912] 1 Ch. 519.
(2) (1888) 39 Ch. D. 534.
(3) L. R. 4 Eq. 295.
(4) (1914) 111 L. T. 524.

C. A.
1939
DARBY.
In re.
RUSSELL
v.
MACGREGOR.

Sir Wilfrid Greene M.R.

capital and income with regard to the payments of the annuity charged by the testator's will.

Prima facie, the suggestion that there should be such an apportionment is one that would not appear to be well founded. The case in its simplest aspect is of this nature. The testatrix, being possessed of property, namely, the testator's residuary estate subject to the annual charge imposed upon it by the testator's will, settles that property together with her own residue on trusts for the tenant for life and remainderman. Prima facie, the ordinary rule would apply that the tenant for life in such a case must keep down the annual charge upon the settled property. It is said, however, that that is not so and that the case is one to which the rule in *Allhusen* v. *Whittell* (1) applies, and that as the result of the application of that rule every payment in respect of the annuity under the testator's will ought to be treated as being made in part by means of capital and in part by means of income. When I say it is said that it ought to be so treated, I mean that it ought to be so treated as between the tenant for life and remainderman, because it is not suggested that the application of the rule in *Allhusen* v. *Whittell* (1) to the present case could be allowed to affect the right of the annuitant to have the testator's residuary estate, upon which the annuity was a charge, dealt with in the proper way for the purpose of securing and paying her annuity. The proposition which is put is one which only applies as between tenant for life and remainderman. It is not disputed that, so far as the annuitant is concerned under the testator's will, she is entitled to have that residue properly applied and preserved as security for her annuity; prima facie her right would be to have the annuity kept down out of income without resort to capital, because resort to capital would involve the diminution of her security. Whether as between herself and the testatrix she could complain with regard to any specific dealing with capital might depend upon circumstances existing at the time; but in approaching the present case I do not think it is permissible to deal with it on any

(1) L. R. 4 Eq. 295.

footing other than this, that as between herself and the testatrix the annuitant was entitled to have the payment made primarily out of income. The consequence of that admittedly is that, if the appellant's argument is right and the rule in *Allhusen* v. *Whittell* (1) applies, it could only be applied with regard to any particular payment of the annuity with the consent and approval of the annuitant herself; but it is also said that, if that consent could not be obtained, nevertheless the tenant for life would be entitled on the death of the annuitant to require what might be called a deferred application of the rule in *Allhusen* v. *Whittell* (1) and insist upon being recouped out of capital a sum which would give effect to the rule. The rule in *Allhusen* v. *Whittell* (1) in its simplest form applies to the simple case where a testator has left debts immediately payable, and with regard to such a state of affairs the rule can be quite simply stated in the words of Lord Hatherley L.C. in *Allhusen* v. *Whittell.* (1) He says: " What I apprehend to be the true principle is, that, "in the bookkeeping which the Court enters upon for the "purpose of adjusting the rights between the parties, it is "necessary to ascertain what part, together with the income "of such part for a year, will be wanted for the payment of "debts, legacies, and other charges, during the year; and the "proper and necessary fund must be ascertained by including "the income for one year which may arise upon the fund "which may be so wanted." That year, of course, is, in the normal case, the executor's year; but then comes a different type of case, namely, a case where the debt in question is a debt payable at some future date; in the case of an annuity which the testator covenants to pay the instalments of that annuity become payable periodically every year, and, when it is a question of applying to such a liability the rule in *Allhusen* v. *Whittell* (1), the principle which has been laid down is that each instalment as it becomes payable is to be paid by means of a piece of capital together with the income on that piece of capital as from the date of the testator's death down to the date of payment. That is a logical application of the rule in *Allhusen* v. *Whittell* (1), and, in so far as covenants to pay annuities are concerned, it has been held in cases which were decided a long time ago that that is the proper method of working it. The cases are *In re Perkins* (2) and *In re Poyser.* (3)

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(1) L. R. 4 Eq. 295, 303.

The present case is different from cases of that character in a vital respect. There is not here any personal covenant to pay the annuity charged by the testator's will, the testatrix was under no personal liability in that sense, she had not covenanted to pay, and, accordingly, in the administration of her estate the liability to pay that annuity cannot be treated in the same way as a liability to pay an annuity in respect of which she herself had entered into a personal covenant. The liability owed its origin not to a personal covenant by her but to a charge created by the testator's will.

An attempt was made in the argument to establish the proposition that this testatrix ought to be treated as though she had entered into a covenant to pay the annuity on the ground that she was under a personal liability to the annuitant to pay it, and in support of that proposition several cases were referred to, of which *In re Williames* (4) is the typical case. *In re Williames* (4) and the cases which have followed the same principle are dealing with a case where property is settled on two or more persons successively, and the life tenant or tenants, if there are more than one, have imposed upon them by the terms of the will an obligation to make certain payments, discharge certain outgoings, do certain repairs, or whatever it may be. In cases of that kind the Court treats the life tenant as binding himself by the mere acceptance of the testator's bounty to carry out the conditions which the testator has imposed upon any one accepting it, and in giving effect to that it has treated the successive life tenants as under an obligation in equity to carry out and perform the conditions subject to which they became entitled to the gift.

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(1) L. R. 4 Eq. 295.
(2) [1907] 2 Ch. 596.
(3) [1910] 2 Ch. 444.
(4) 52 L. T. 41; 54 L. T. 105.

Those cases, in my opinion, have no application to the present at all. This is not a case of successive interests in property which as between the persons successively interested can only be held upon the terms of making some payment or discharging some liability. This is an absolute and out and out gift by the testator to his daughter, and the fact that under the terms of the testator's will that gift is made subject to and charged with the payment by her of the annuity to the testator's widow does not, in my opinion, impose any personal liability upon the testatrix in the sense which is suggested. No doubt when she takes the testator's residue she takes it subject to the charge and all the obligations which that imports. She would be liable to account for what she had received at the instance of the annuitant. She would be liable to have the annuitant's right enforced against her as the person in possession of the property subject to the charge, but that is a different thing from saying that she is under a personal liability to the annuitant. The case, in my opinion, is quite different from that of *In re Williames* (1) and similar cases, and it is not possible to import into the relationship between the annuitant and the testatrix any such conception of personal liability as would bring the case within the four corners of decisions like *In re Poyser* (2), because it is for the purpose of bringing the case within the four corners of such decisions that the argument as to personal liability is brought forward.

Taking the case, therefore, as one in which the testatrix took the property subject to that charge and did not in any relevant sense become subject to a personal liability, the question arises: Is there any room for the application of the doctrine in *Allhusen* v. *Whittell* (3) to such a case? No authority has been produced, with the exception of one case to which I shall presently refer, in support of that proposition, and indeed the proposition is one which on principle, in my judgment, cannot be maintained. The rule in *Allhusen* v. *Whittell* (3), like so many other rules which the Court of

(1) 52 L. T. 41; 54 L. T. 105.

(2) [1910] 2 Ch. 444.

(3) L. R. 4 Eq. 295.

C. A.
1939
DARBY, *In re.*
RUSSELL v. MACGREGOR.
Sir Wilfrid Greene M.R.

equity has adopted, is for the purpose of giving effect to an equitable arrangement which the testator may be presumed to have intended in making the dispositions which he did make. It can be displaced by any language of the will which sufficiently shows an intention to displace it and, in my opinion, it also ceases to be applicable where the nature of the property concerned or the circumstances affecting it are such as to make it impossible to apply the rule as it ought to be applied. What I mean by that is this. In applying the rule in *Allhusen* v. *Whittell* (1) to the case of a periodical payment under a covenant, the rule contemplates that the payment will be made when the amount payable falls due and that it will be paid in part out of capital and in part out of income. In such a case there is nobody who can say that such a payment ought not to be made. In the present case it is admittedly impossible with regard to any particular payment of the annuity to the widow under the testator's will to make the payment in such a way without the consent of the annuitant herself. That means this, that as each payment comes to be made the rule in *Allhusen* v. *Whittell* (1) could not be applied to it without the consent of the third party. The testatrix, when she made the dispositions that she did, settling her residuary estate which included this mass of property representing her father's residue, must be taken to have known what the rights of the annuitant were, and I find it impossible to treat her dispositions as containing an implied intention that payments in satisfaction of the annuity should be made in a manner in which it was not possible to make them without the consent of the annuitant. As I have said, it is not disputed that such consent would be necessary. That circumstance appears to me to justify what I said a moment ago, that if the nature of the property concerned or the circumstances affecting it are such that the rule cannot be applied according to its terms, then the rule is not applicable to the case at all. Here it cannot be applied in accordance with its terms because the consent of the annuitant would be necessary.

(1) L. R. 4 Eq. 295.

Mr. Gray endeavours to get out of that difficulty by saying: So be it, but there will be no objection to a deferred application of the rule after the death of the annuitant when the capital is free from the annuity; when that event happens it will be possible to recoup to income, out of capital, that proportion of the various instalments of the annuity which ought to have been borne by capital, at the time when they were paid, upon the principle of *Allhusen* v. *Whittell.* (1) It seems to me that that method of escape is not open to Mr. Gray, because the fact that at the time of payment the rule cannot be applied appears to me to negative the proposition that the rule is applicable to the case at all. Again, no authority for the proposition that the rule can be applied by some such deferred operation was produced, and, in my judgment, on principle it is unsound.

There are two other cases to which I should make short reference. One, on which Mr. Gray, not unnaturally, places strong reliance, is the case of *In re Thompson.* (2) That was a decision of Joyce J., and in some respects it bears a close resemblance to the present case. We have been furnished with copies of documents from the Public Record Office—namely, the originating summons, the affidavit in support, an extract from the relevant will and the order of the learned judge; and from those documents and from the report of the case it appears that there, as here, there were two testators: the first testator had bequeathed his residue in trust to pay certain annuities, and in that respect the case is different to the present. The trustees had permitted the legatee of the residuary estate to take over the whole of the residue upon his undertaking to pay the annuities. He, it so happens, was one of the trustees, and there can be no question but that in that case the property in his hands was subject to a trust for payment of the annuities. He, holding the property in that way, made his own will by which he settled his residuary estate, and the question arose as to how as between capital and income the instalments of annuity payable under the will of the original testator ought to be

(1) L. R. 4 Eq. 295.

(2) [1908] W. N. 195.

C. A.
1939
DARBY,
In re.
RUSSELL
v.
MACGREGOR.

Sir Wilfrid Greene M.R.

met. Now, when the documents are examined, it appears that for the purposes of the summons the residuary estate of the original testator which, as I have said, in the hands of the second testator was trust property, was treated as though it was the property of the second testator, and no particular reference seems to have been made to the existence of the trust. The order made by Joyce J. was to the effect that the instalments of annuity ought to be apportioned between the corpus and income of the testator's estate on the principle of *Allhusen* v. *Whittell.* (1) That was a case which resembles the present in the circumstance that the annuity was not one secured by covenant by the second testator and accordingly was not one in respect of which the second testator was under a personal liability. The report in the Weekly Notes gives no reasons for the judgment of the learned judge. It may be that he treated the case upon the footing that the first testator's estate ought to be regarded as something quite separate and a trust estate as though it was vested in independent trustees. I do not know, and it is impossible to ascertain, what was the reasoning upon which the learned judge based his judgment. But in so far as that case is inconsistent with the present decision of this Court, it must be taken as being overruled. In any event I find it impossible to obtain any real assistance from the report of that case even when coupled with the documents which have been supplied to us. In the absence of any report of the reasoning of the learned judge, I therefore cannot treat that case as one which really helps us.

There is another case, also decided by Joyce J., which does appear to me to be precisely in point: that is the case of *In re Popham.* (2) In that case under a settlement property was subject to a rentcharge, and subject to that rentcharge it was appointed by the settlor under a power conferred upon him by the settlement in trust for a tenant for life with remainders over; it was a case, therefore, where property subject to a rentcharge was appointed by the person competent to appoint it in trust for one life with remainders

(1) L. R. 4 Eq. 295.

(2) 111 L. T. 524.

C. A.
1939
DARBY, *In re.*
RUSSELL v. MACGREGOR.
Sir Wilfrid Greene M.R.

over. There was there no covenant by the testator to pay the rentcharge. It was argued there that the rule in *Allhusen* v. *Whittell* (1) should apply and that as between the tenant for life and remainderman there should be an appropriate apportionment. It is not without interest to observe that Mr. Austen-Cartmell, who argued the case for the tenant for life, agreed that there was no case upon the point where there was no covenant by the testator. Joyce J. said this (2) ; his judgment is quite short: "A suggestion is made on "behalf of the tenant for life under the limitations in the "will of the settlor that he ought not to bear"—the report is obviously in error there, it omits the "not"—"the whole "of the rentcharge out of income, but that a proportion "ought to be borne out of capital by the corpus of the estate. "There appears to be no authority in support of any such "contention as that which has been set up in this case, and "there are no doubt plenty of cases where the estate of a "testator is subject to an annuity and where the testator "personally or his estate has been held liable for the payment "thereof. That has, however, apparently never been done "between a tenant for life and remaindermen where the testator "and his estate was not liable. I cannot, in the absence of "authority, accept any such contention." Those words appear to me to be applicable to the present case. This is a case where the daughter and her own estate were not liable for this annuity at all. The liability consisted and consisted only of such liability as was created by the charge impressed by the testator upon that part of her estate which represented his estate; and it seems to me that *In re Popham* (2) is a case which really is on all fours with the present in all material respects. It is also worth noticing that *In re Thompson* (3) was cited to the learned judge, his own decision, and he evidently did not regard it as a decision which in any way prevented him from deciding *In re Popham* (2) as he did decide it.

I hope that I have done justice in what I have said to the

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(1) L. R. 4 Eq. 295.
(2) 111 L. T. 524.
(3) [1908] W. N. 195.

C. A.
1939
DARBY,
In re.
RUSSELL
v.
MACGREGOR.

very full and clear argument put forward before us by Mr. Gray. The learned judge held that the principle in *Allhusen* v. *Whittell* (1) had no application to the present case. I agree with that view, and the appeal must accordingly be dismissed.

FINLAY L.J. I agree.

LUXMOORE L.J. I also agree.

After discussion with counsel, the order of Farwell J. was varied by discharging the second part thereof down to and including the words "to pay the amount required" and substituting for the discharged part a declaration that, as between the persons interested in the capital and income respectively of the estate of the testatrix under her will, the annuity given to the annuitant by the testator's will was to be deemed for all purposes to be payable wholly out of the income of the property representing the testator's estate, except in so far as such income was insufficient to pay the same. The rest of the second part of Farwell J.'s order stood. Farwell J. had also ordered that the costs of the plaintiffs and defendants be taxed as between solicitor and client and paid by the plaintiffs out of the residuary estate of the testatrix. That order regarded the testator's residue as part of the estate of the testatrix. The Court of Appeal varied that order, so far as regarded the costs below, and made all the costs, both in the Court of Appeal and in the Court below, as between solicitor and client, payable out of the residuary estate of the testatrix, exclusive of any part thereof representing the testator's residuary estate.

Appeal dismissed.

Solicitors: *Minchin, Garrett & Worley; Royds, Rawstorne & Co.*

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(1) L. R. 4 Eq. 295.

K. R. A. H.

Distinguished. BIRCH *v.* TREASURY SOLICITOR. [1950] 2 All E.R. 1198.

Distinguished. BIRCH *v.* TREASURY SOLICITOR [1951] 1 Ch. 298

LUXMOORE L.J.
1939
July 13, 17.

DELGOFFE *v.* FADER.

[1938. D. 1932.]

Donatio mortis causa—Delivery of bag by donor in contemplation of death—Gift of bag and contents to donee—Bank deposit account book—Not a document of title—Not subject-matter of a valid donatio.

A woman, who was seriously ill and in expectation of death, had been removed at her own request from a hospital to the house of a friend, where she could be taken care of. While there she asked her friend to go to her own house and fetch a handbag for which she gave her keys. The bag was brought and given to her, when she told her friend to put it in a wardrobe in her room and said: "If I die, you are to have this bag, and everything that is in it"; confirming a statement that she had previously made to her friend in her own house. The donor was shortly afterwards removed to a hospital, where she died a few days later. The bag contained some jewellery and trinkets, cash and other articles, and a bank deposit account book, showing a credit balance of 933*l.* in the donor's favour. The book contained a statement that seven days' previous notice was required for the withdrawal of any money from the account. There was evidence that its production was not necessary either for paying in or drawing out money:—

Held, that, as the book did not contain the terms of any contract between the donor and the bank, it was not a document of title and could not be the subject of a valid donatio mortis causa, but, there being a good delivery of the bag and its contents to the plaintiff, the requirements of a valid donatio as to the other articles were satisfied.

In re Dillon (1890) 44 Ch. D. 76 and *In re Weston* [1902] 1 Ch. 680 distinguished.

ACTION.

The plaintiff, Mrs. Marie Theophile Palmyre Delgoffe, claimed as against Mrs. Ilsa Elizabeth Fader, the personal representative of Mrs. Emilie Krieg, who died on December 19, 1937, a declaration that Mrs. Krieg had made a valid donatio mortis causa to the plaintiff, shortly before her death, of a black handbag and the contents. The bag contained some jewellery and trinkets of small value, a sum of loose cash, other articles and an envelope enclosing a banker's deposit account book issued by the Midland Bank, Barnes, which showed that the deceased at the date of her death had 933*l.* 8*s.* standing to her credit on the account.

The action turned mainly on the question of delivery, and, assuming there was a good delivery, whether the bank deposit book could be the subject of a valid donatio. The facts are fully stated in the judgment of the learned judge.

C. V. Rawlence for the plaintiff. There is, so far as I have been able to discover, no case in which the question has been raised whether a bank deposit account book could be the subject of a donatio mortis causa. In *In re Taylor* (1) it appears to have been assumed that a deposit account could be a good subject. The most important modern authority on similar questions is *In re Dillon* (2), where all the previous cases, including *Duffield* v. *Elwes* (3), are fully discussed.

The document not only contains an acknowledgment of the debt, but also a statement of the terms on which the money is held by the bank—namely, that seven days' notice of withdrawal must be given and that interest at varying rates will be credited half-yearly.

The evidence shows that Mrs. Krieg knew she was very ill, and made this gift in contemplation of death. There was sufficient delivery of the bag to the donee on two occasions, but, if not on the first, there certainly was on the second, when the bag was sent for from the donor's house, handed to the donee, and then placed in the donee's wardrobe for safe custody. It is submitted that there was a valid donatio mortis causa of the contents of the bag, including the deposit account at the bank. [*In re Weston* (4) and *In re Richards* (5) were also referred to.]

A. Aiken Watson for the defendant. The evidence of the bank manager shows that there is no difference between this deposit account book and an ordinary pass-book, except that one deals with a deposit, the other with a current account. The book is merely a record of what has been paid in and withdrawn. Its production to the bank was not necessary before either paying in or drawing out money, and therefore

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(1) (1887) 56 L. J. (Ch.) 597.
(2) (1890) 44 Ch. D. 76.
(3) (1827) 1 Bli. N. S. 497.
(4) [1902] 1 Ch. 680.
(5) [1921] 1 Ch. 514.

LUXMOORE L.J.

1939

DELGOFFE v. FADER.

it is not a document of title. A banker's deposit receipt can be the subject of a good donatio, as is shown in *In re Dillon* (1) and other cases, but that is only because it shows all the terms of the contract between the banker and the customer. In *Dillon's* case (1) the terms of the contract were endorsed on the note. An Exchequer Bond deposit book was held to be a good subject of a donatio in *In re Lee* (2), but it contained a certificate of the holder's title to registered bonds. See also *In re Andrews*. (3) In *In re Beak's Estate* (4) Bacon V.-C. held that delivery of a cheque was not a good donatio mortis causa, and said that he could not see that the delivery of the bank pass-book made any difference. Two Irish cases are in my favour: *M'Gonnell* v. *Murray* (5) and *Duckworth* v. *Lee*. (6) The exact point has been decided in a Canadian case—*Cusack* v. *Day* (7), where the Court held that a bank deposit book was not the subject of a valid donatio. If there was any valid delivery, it could only have been on the second occasion, in the plaintiff's house. But it is submitted that the deceased never parted with the dominion over the bag and its contents.

[*In re Johnson* (8) and *In re Wasserberg* (9) were also referred to on the question of delivery.]

C. V. Rawlence replied.

LUXMOORE L.J. In this case the plaintiff seeks to establish that the late Mrs. Emilie Krieg made a delivery to her of a black handbag and its contents in such circumstances as to constitute a valid donatio mortis causa. The claim is supported by the plaintiff's evidence and is resisted by the defendant, who is the legal personal representative of Mrs. Krieg.

The material facts are as follows: Mrs. Krieg was a German. She lived with her brother-in-law and sister, her sister having married an Englishman, a Dr. Williamson.

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(1) 44 Ch. D. 76.

(2) [1918] 2 Ch. 320.

(3) [1902] 2 Ch. 394.

(4) (1872) L. R. 13 Eq. 489.

(5) (1868) I. R. 3 Eq. 460.

(6) [1899] 1 I. R. 405.

(7) [1925] 3 D. L. R. 1028.

(8) (1905) 92 L. T. 357.

(9) [1915] 1 Ch. 195.

Her sister died, and she continued living with her brother-in-law at 68 Madrid Road, Barnes, until he died in December, 1937. Some years before that date Mrs. Krieg had made the acquaintance of the plaintiff. The first acquaintance had been due to a business relationship, Mrs. Delgoffe having carried on for a number of years the business of a ladies' hairdresser in High Street, Kensington, and in that business Mrs. Krieg had been a regular customer. According to the plaintiff's evidence, Mrs. Krieg attended at the plaintiff's place of business every Monday for a period of nine years. Mrs. Delgoffe gave up her business in April, 1935. Afterwards she used frequently to see Mrs. Krieg; she called at her house and transacted a number of small business commissions for her, and so on. After Dr. Williamson's death she saw her more frequently, and she called upon her some three or four times a week.

Mrs. Krieg went abroad in the summer of 1937. While she was abroad she wrote to Mrs. Delgoffe asking her to come to meet her at the railway station on her return, and Mrs. Delgoffe met her. Mrs. Krieg was not well when she came back and, although she recovered slightly, after a fortnight she became worse, and Mrs. Delgoffe called in a Dr. Davie, who attended her until October, when Mrs. Krieg took to her bed. Mrs. Delgoffe was with her practically every day looking after her wants, waiting on her for meals, and so on, and doing her shopping, but Mrs. Krieg was left alone at night. As she got considerably worse a specialist was called in and, with the approval of Dr. Davie and the specialist, Mrs. Krieg was taken to the West London Hospital.

About a week before she was taken to the West London Hospital, when she was still very ill and, as Dr. Davie says, in an apprehensive state with regard to the future, she spoke to Mrs. Delgoffe and asked her to go to the washstand, which was in Mrs. Krieg's bedroom, to take from the drawer in the washstand a key and unlock a medicine-chest which was in it. Inside the medicine-chest was another key, which was the key of the wardrobe in her room, and Mrs. Krieg asked Mrs. Delgoffe to open the wardrobe and take from it a black bag. When Mrs. Delgoffe had done this, Mrs. Krieg said that she wanted Mrs. Delgoffe to pay attention to what she was going to say to her, and Mrs. Delgoffe says that Mrs. Krieg said in German: "If I should die, then you are to get everything in "this bag, the jewelry and also what is in the envelope." The bag contained a number of articles, coins, money, articles of jewelry, a watch, some chains, and so on, articles which would pass by delivery, chattels in the ordinary acceptation of the word. In addition there was an envelope containing a deposit book of the Midland Bank, which showed that Mrs. Krieg had a sum of 933*l.* 8*s.* standing to her credit on that account. Having said this, Mrs. Krieg told Mrs. Delgoffe to put the bag back into the wardrobe, and the key back into the medicine-chest in the washstand. Mrs. Delgoffe says: "She "told me to put it back in the same place, where I could "find it," and that Mrs. Krieg then added: "Should I die, "then you will have the bag and everything that is in it." That is the first occasion on which it is alleged that there was a valid donatio mortis causa. I will deal with this later.

The second occasion on which reliance is placed happened some time afterwards. Some few days after the first occasion Mrs. Krieg was taken to the West London Hospital—on November 11. Mrs. Delgoffe continued to visit her, going there twice a day and stopping until 9 o'clock every night. Mrs. Krieg was there for three weeks, and ultimately left the hospital, not because she was cured, but because she preferred to be in her own home. But as she would be alone in her house she asked Mrs. Delgoffe to take her to the house in which Mrs. Delgoffe lived, that is, 32 Sinclair Road, and Mrs. Delgoffe agreed to do so. While she was in Mrs. Delgoffe's house she occupied one of the rooms set aside for Mrs. Delgoffe's use referred to as the dining-room. Mrs. Krieg had her bed in that room, and after she had been there two or three days she said to Mrs. Delgoffe that she wished that Mrs. Delgoffe had the black bag, and asked her to go and fetch it from Madrid Road. Mrs. Delgoffe went to Madrid Road with a Mrs. Sharman, and brought back the bag. She had been given Mrs. Krieg's keys for the purpose of getting it. When she brought the bag back she gave it to Mrs. Krieg, who opened it and looked inside to see if everything was in order. She said that everything was in order, and asked Mrs. Delgoffe to: "Put this bag into your "wardrobe so that I can keep my eye on it." The wardrobe was opposite the bed which Mrs. Krieg was occupying. Mrs. Krieg then added: "Should I die, I wish you to have "the bag and everything that is in it." Mrs. Delgoffe says that after that she put the bag in the wardrobe. A few days afterwards Mrs. Krieg was taken to the German Hospital and died there nine days after her admittance. Mrs. Delgoffe says that Mrs. Krieg often told her that she would do something for her and that she was anxious that she should have everything in the black bag.

The questions which I have to determine are whether there has been a donatio mortis causa in respect of the whole or any and which of the articles contained in the black bag and the black bag itself. A donatio mortis causa is a well recognized form of gift. It is one made in contemplation of the death of the donor and is to take effect only in that event, being recoverable by the donor if that event does not occur. Such a gift is in effect in the nature of a legacy, being subject to a condition express or implied that it is only to take effect in the event of the survivorship of the donee.

There are to be found in the books many cases dealing with the subject-matter of donationes mortis causa. Three essentials are necessary to constitute such a gift: first, the gift must be made in contemplation of the death of the donor, although not necessarily in expectation of death; secondly, there must be delivery of the subject-matter of the gift to the donee, or, I think, a transfer of the means of, or part of the means of, getting at the property; and, thirdly, the circumstances must be such as to establish that the gift is only to take effect on the death of the donor. It follows that the title of the donee is never complete until the donor is dead. If the subject-matter of the gift is not completely vested, the question arises whether the donee can call on the legal personal representative of the donor to complete the title.

LUXMOORE L.J.

1939

DELGOFFE v. FADER.

Where there is a donatio mortis causa of a subject-matter which is not completely vested, I think that the true legal aspect is that a trust has been raised under which the donee can call on the legal personal representative of the donor to complete the gift.

That aspect of the case was settled in *Duffield* v. *Elwes* (1) and has been recognized for years. Of course, in the case of a chose in action, physical delivery is impossible, but it has been held that in such cases the delivery of a document essential to its recovery may be sufficient. The test whether the delivery of the document constitutes a good donatio mortis causa of a chose in action depends on the answer to the question whether the document expresses the terms on which the subject-matter of the chose in action is held by the donor or the terms under which the chose in action came into existence.

I think that that is really the result of the authorities which begin with the decision of the Court of Appeal in *In re Dillon* (2) In that case the question was whether a banker's deposit note was a good subject-matter of a donatio mortis causa. The form of the deposit note in question is set out in the report. It states in the body of the note that: "This deposit receipt is not transferable. The amount is "repayable on demand, but will bear no interest unless it "remains undisturbed for one month. The rate of interest is "subject to alteration, of which notice will be given by "advertisement in The Times newspaper. When the money "is withdrawn or the interest paid the depositor must sign "the cheque on the back hereof, first affixing a penny stamp. "If part only is withdrawn a new receipt will be given for the "balance." Then on the back of the note was form of a cheque endorsed to the bank which had issued the note directing the bank to pay to self or bearer the sum which would be filled in in the blank, and it was necessary, in order to withdraw the whole or any part of the money the subject-matter of the note, for the depositor to sign the note.

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(1) 1 Bli. N. S. 497.

(2) (1890) 44 Ch. D. 76.

Cotton L.J., in dealing with the matter, said (1): "If we go "on principle, why should not this document be a good "subject of donatio mortis causa? It is true that the fact "of the cheque having been filled in and signed does not give "the donee a title at law to be paid, since the cheque was "not presented till after the death of the drawer. But why "should there not be a good donatio mortis causa apart from "the cheque? The case of *Duffield* v. *Elwes* (2) shows that "there may be a good donatio mortis causa of an instrument "which does not pass by delivery, and that the executors of "the donor are trustees for the donee for the purpose of giving "effect to the gift. The case of *Moore* v. *Darton* (3) is very "instructive as to the class of instruments which are subjects "of donatio mortis causa. There a document was executed "when a deposit of money was made. The mere fact of the "deposit would create a debt; but the document, beside "acknowledging the receipt of the money, expressed the "terms on which it was held, and showed what the contract "between the parties was. It was held that the delivery of "that document was a good donatio mortis causa of the "money deposited, and so, in my opinion, was the delivery "of the deposit note in the present case. The delivery gives "no legal title to the donee, nor did the delivery of the "security in *Duffield* v. *Elwes* (2); but the House of Lords "there laid it down that the executors were trustees for the "donee and must do what was necessary to perfect the transfer. "This would not be so in the case of an incomplete voluntary "gift inter vivos—the Court would not interfere to compel "either the donor or his executors to perfect it; the doctrine "is an anomalous one peculiar to the case of a donatio mortis "causa, but it is established by the decision of the House "of Lords."

Cotton L.J. was there pointing out that in *Moore* v. *Darton* (3) the actual document which was delivered was a necessary link in the obtaining by the donee of the money which was the subject-matter of the written document which had been delivered; that without it the donee would not have been able to get anything. It was the document which showed that the money was due to the donor on a specialty and was not any ordinary debt, and it was the document which showed the terms which it would be necessary to establish in order to prove the existence of the contract.

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(1) 44 Ch. D. 81.

(2) 1 Bli. N. S. 497.

(3) (1851) 4 De G. & Sm. 517.

In the Irish case of *Duckworth* v. *Lee* (1) the English cases were considered, including *Moore* v. *Darton* (2), and it was said by Lord Ashbourne C. (3): "In all the cases which "have been cited where the gift has been upheld, the "document or deed delivered was essential to the recovery "of the debt." I think that that statement is justified by the authorities.

In *In re Weston. Bartholomew* v. *Menzies* (4) the question arose whether there was a valid donatio mortis causa of a Post Office Savings Bank deposit book and also of certain share certificates in a certain building society. It was held that the share certificates in the building society were not the subject-matter of a donatio mortis causa, but the learned judge held that the savings bank book was capable of delivery so as to constitute such a gift. It seems plain from the reasoning of Byrne J. that the ground on which he held that the Post Office Savings Bank deposit book could be the subject-matter of a valid donatio mortis causa was that the book itself contained in substance the whole of the terms regulating the contract of deposit, and that one of the important matters present in that case was that the book itself had to be produced when money was deposited or withdrawn.

Byrne J. there said (5): "With reference to the remaining "question, as to the gift of the savings bank book, ever since "the decision of the Court of Appeal in the case of *In re* "*Dillon* (6), it is well established that a banker's deposit "receipt in a form showing the terms of the contract and "being more than an acknowledgment for the receipt of "money is good subject for a donatio mortis causa. The

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(1) [1899] 1 I. R. 405.
(2) 4 De G. & Sm. 517.
(3) [1899] 1 I. R. 407.
(4) [1902] 1 Ch. 680.
(5) Ibid. 685.
(6) 44 Ch. D. 76.

"question had not previously come before a Court of Appeal "in England, although there had been, as stated by Cotton L.J. "in the last mentioned case, a current of decisions in Courts "of first instance in England in favour of that view." His Lordship referred to *Moore* v. *Darton* (1) and the judgment of Cotton L.J. in *In re Dillon* (2) and said: "An examination "of the savings bank book in the present case appears to "me to show a fulfilment of the test; and although every "rule regulating the contract is not set out in the book itself, "all the essential rules are. The book is not a mere receipt. "It must, as stated on the face of it, be produced whenever "any money is deposited or withdrawn, and it contains the "terms of the contract as to payment of interest and withdrawal as well as the other material terms of the contract "between the depositor and the Savings Bank Department." He went on to say: "Apart from authority pointing the "other way, I should have considered it impossible, after "comparing the terms of the deposit receipts in the cases of "*In re Dillon* (2) and *Moore* v. *Darton* (1) with the savings "bank book, to hold that the latter is not a good subject "for donatio mortis causa." Then he referred to two Irish cases, including the Irish case of *Duckworth* v. *Lee*. (3)

This being, as I think, the test to be applied in the case of a chose in action, what is the position in the present case with regard to the deposit book? Mr. Drury, the manager of the particular branch of the Midland Bank where the deposit was made, gave evidence that the deposit book which was in the black bag was in no way essential to be produced if the depositor had required to withdraw her money or if she had desired to deposit further money in the bank. The book itself is, in form, the pass-book of the deposit account. The only statement which makes it different from an ordinary pass-book is the statement that seven days' notice of withdrawal is required. No other conditions appear in the book. Nothing is said with regard to the interest to be paid in respect of the deposit, or anything of that kind, nor is anything said about the mode of withdrawal from the account. Mr. Drury said that the usual method of withdrawal was by a formal receipt given by the depositor to the bank for the amount withdrawn, or by transfer on written instructions from the depositor's account to a current account. Mrs. Krieg had no current account, but she in fact operated her deposit account by making deposits and drawing cheques on it in the same manner as she would have operated a current account. This was, I think, by the courtesy of the bank, but if the deposit book had been lost, no indemnity would have to be given, or anything of that sort. The contract with regard to interest was that the bank could vary it at twenty-four hours' notice, and that the interest was worked out on a day to day basis and the balance credited half-yearly in the actual account.

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(1) 4 De G. & Sm. 517.
(2) 44 Ch. D. 76.
(3) [1899] 1 I. R. 405.

Those are the material circumstances with regard to this deposit account. In view of the evidence of the bank manager it seems to me impossible to say that this deposit book was such a document as would enable the holder of it to make a valid donatio mortis causa in respect of the money standing to the credit of the account. I see no difference between this deposit book and the ordinary pass-book of a current account. That being so, I must hold that, at any rate so far as the deposit book is concerned, it is not the subject-matter of a valid donatio mortis causa.

With regard to the other items in the bag, I have come to the conclusion that the requirements of a donatio mortis causa have been satisfied. The claim is a claim by a woman against the estate of a deceased person. It is uncorroborated, but I have had the advantage of seeing Mrs. Delgoffe in the witness-box. I am quite satisfied that she was a truthful witness and that the story which she told is one which I am not only entitled to accept but bound to accept. I think that there was a sufficient delivery of the black bag and the contents of it, other than the pass-book, on the second occasion to satisfy the requirements of a valid donatio. So far as the first occasion is concerned, I do not think, if it stood alone, it would have been sufficient to justify me in holding that Mrs. Krieg had parted with the possession of the subject-matter of the gift, because she required the plaintiff to replace the black bag with its contents in the place whence it was taken; it was kept under the dominion of Mrs. Krieg the whole time, and Mrs. Delgoffe would not have been in a position to demand possession from Mrs. Krieg.

On the second occasion the bag was handed to Mrs. Delgoffe with the direction to place it in the wardrobe which was in the room in question, which was Mrs. Delgoffe's wardrobe. Although Mrs. Krieg had the benefit for the time being of using that wardrobe, that was not a sufficient circumstance to prevent the delivery of the bag to Mrs. Delgoffe being sufficient to constitute an absolute gift. I hold that the black bag and all the articles in it, other than the pass-book and the money standing to the credit of the deposit account, passed under a valid donatio mortis causa to the plaintiff, and to that extent the plaintiff's action succeeds; but so far as the pass-book and the 933*l.* 8*s.* standing to the credit of the deposit account is concerned, I must hold that there is no valid donatio mortis causa.

Solicitors: *Ford, Michelmore, Rose & Wilkins; Watson, Sons & Room.*

H. L. L.

MORTON J.

1939

May 16, 17.

In re DE CHASSIRON.

LLOYDS BANK, LIMITED, AND OTHERS *v.* SHARPE.

[1939. D. 431.]

Will—Construction—Residue—Trust fund—Income—Annuities—Power to resort to capital—Surplus income to charities—Ultimate residue to charities absolutely—Old and young annuitants—Income insufficient—Intention—No valuation of annuities.

A testatrix directed her executors and trustees, who, at the date of this summons, were a bank, to pay out of the income of her residue (with power to resort to capital) six annuities, to pay any surplus income equally between four named charities, to pay the annuity of any annuitant dying equally between the survivors and, on the last survivor's death, to hold the capital and future income of the residue on trust for the charities absolutely in equal shares. At the date of this summons the income from the residue could not cover the annuities, and the ages of the annuitants were 80, 73, 68, 64, 49 and 41 years. By the summons the bank asked (inter alia) whether the bank ought to have the annuities and the amount of the legacy duty on them valued, either at the date of, or a year after, the testatrix's death or at the date of the order on the summons, and to pay to the annuitants the amounts, or abated amounts, of the valuations :—

Held, (1.) that the testatrix had foreseen that the income from the residuary trust fund might be, as, in fact, it was, insufficient to pay the annuities, and had indicated that, in that event, the trustees were to draw on the trust fund, year by year, to pay the annuities in full ;

(2.) that a testator is not, in the absence of words in his will clearly revealing such an intention, to be presumed to have intended a fund so to be applied that elderly annuitants may be paid in full during the whole of their lives and younger annuitants may not ; but that, in the present case, the testatrix did intend her trust fund to be so applied, and might be taken to have known the approximate ages of the annuitants ;

(3.) that the testatrix's intention could be carried out exactly, although the fund might thus be exhausted, with the possible result that the older annuitants would be paid in full and the younger would not ;

(4.) that there should be no valuation of the annuities, but that they should be paid year by year out of the income of the trust fund and, if the income was not sufficient in any year, out of the capital thereof.

In re Cottrell [1910] 1 Ch. 402 ; *In re Cox* [1938] Ch. 556 ; *In re Nicholson* [1938] 3 All E. R. 270, and *In re Farmer* [1939] 1 Ch. 573, considered and distinguished.

ADJOURNED SUMMONS.

By her will dated September 5, 1938, Baroness Alice Margaretta Crichton de Chassiron (hereinafter called "the testatrix") appointed Lloyds Bank, Ld. (hereinafter called "the bank") and certain other persons, her executors and trustees, gave pecuniary legacies free of duty, and gave her residuary estate to her trustees on trust for sale, conversion and investment. She referred to her residuary estate, and to the investments representing it, as "my trust fund," and proceeded: "I direct that my trustees shall out "of the income of my trust fund and the investments for "the time being representing the same pay the annuities "which I give as follows, all free of duty: To my niece the "said Rose Alice Guinness Sharpe the sum of five hundred "pounds per annum for her life and an extra sum of one "hundred pounds per annum for so long as she shall own "and occupy the house number 19 Brunswick Terrace, which "I have hereinbefore devised to her." Then came: "To my "brother . . . . Gordon Vincent the sum of three hundred "pounds per annum for his life: To my sister . . . . Ada "Vincent the sum of three hundred pounds per annum for "her life: To my sister . . . . Maud Vincent the sum of two "hundred pounds per annum for her life: To my brother ". . . . Henry Vincent the sum of three hundred pounds per "annum for his life: To my nephew John Sharpe the sum "of fifty pounds per annum for his life." The testatrix directed that income of the trust fund not required for the annuities should be paid equally between the Lady Chichester Hospital (Incorporated), the Royal Hospital and Home for Incurables, Putney, Royal London Ophthalmic Hospital (Moorfields Eye Hospital), and Brighton Institution for Deaf and Dumb Children: she directed, further, that the annuity of any annuitant dying should be paid equally between the surviving annuitants, and that if, at any time, the income of the trust fund should be insufficient to answer the annuities, recourse might be had to the capital thereof; and she directed also that, on the death of the last surviving annuitant, the trustees should hold the capital and future income of the trust fund on trust for the charities absolutely in equal shares.

At the date of this summons the bank were the sole trustees, and the total amount of the annuities payable was 1650*l.* The annual income of the trust fund was about 750*l.* and, therefore, insufficient. The bank had been advised to have the annuities valued and to pay to the annuitants the respective amounts, or, if necessary, abated amounts, of the valuations. The ages of the annuitants were respectively 80, 73, 68, 64, 49, and 41 years. By the summons the bank asked (inter alia) whether the bank ought to have the annuities and the amount of the legacy duty on them valued, either at or a year after the date of the testatrix's death or at the date of the order on the summons, and to pay to the annuitants the amounts, or abated amounts, of the valuations.

Gerald Upjohn for the bank.

Wilfrid M. Hunt for the two youngest annuitants. This is a case in which the legacies are payable not pari passu with the annuities but in priority to them, and in which the annuities have to be valued and to be paid out on the basis of certain amounts, with abatement if necessary. The same principle applies where there are a large number of annuities: that is to say, where the estate is insufficient, the annuities must be valued; otherwise the older annuitants may be paid in full, and the younger not: *In re Cox.* (1)

C. R. D. Richmount for the four older annuitants.

A. L. Ungoed-Thomas for the charities. Here the annuitants have a right merely to resort to income and, in default of it, to capital. It is entirely a matter of the intention of the testatrix. An intention is shown of providing, in case of inadequacy of income, a power to resort to capital. It all comes down to a matter of construction of this particular will. *In re Nicholson* (2); *In re Farmer.* (3)

MORTON J. The testatrix made her will on September 5,

(1) [1938] Ch. 556.
(2) [1938] 3 All E. R. 270.
(3) [1939] 1 Ch. 573.

1938, and died on the twenty-seventh day of the same month. The will was proved on December 8, 1938, by the plaintiff bank and the other persons therein named. By her will, after appointing the bank and the other persons therein named to be executors and trustees, and making dispositions which I need not read, the testatrix gave certain pecuniary legacies free of duty. No question arises with regard to them. They all have been or will be paid, and they have priority to the annuities mentioned hereafter.

The residuary estate is given to the trustees on trust for sale, conversion and investment. The testatrix refers to the residuary estate and the investments representing it as "my trust fund" and proceeds: "I direct that my trustees shall "out of the income of my trust fund and the investments "for the time being representing the same pay the annuities "which I give as follows, all free of duty: To my niece the "said Rose Alice Guinness Sharpe the sum of five hundred "pounds per annum for her life and an extra sum of one "hundred pounds per annum for so long as she shall own and "occupy the house number 19 Brunswick Terrace which I have "hereinbefore devised to her." I am told that the house referred to has since been sold so that the extra sum of 100*l.* per annum has ceased to be payable to Miss Sharpe. The next annuities are: "to my brother . . . . Gordon Vincent, "the sum of three hundred pounds per annum for his life: to "my sister . . . . Ada Vincent the sum of three hundred "pounds per annum for her life." Then come the following annuities: "To my sister . . . . Maud Vincent the sum of "two hundred pounds per annum for her life: to my brother " . . . . Henry Vincent the sum of three hundred pounds per "annum for his life: to my nephew John Sharpe the sum of "fifty pounds per annum for his life."

The testatrix directed that on the death of each and every of the annuitants her trustees should pay the annuity of the annuitant so dying equally between the surviving annuitants in addition to the annuity given by her to the surviving annuitants: and she directed also that if at any time the income of the trust fund should be insufficient to answer the annuities recourse might be had to the capital thereof; and she declared that any surplus income of the trust fund not required to pay the annuities should be paid equally to the charities thereinafter mentioned, and directed that, on the death of the last of the annuitants to die, the trustees should hold the capital and future income of the trust fund, and of the investments representing it, on trust to be equally divided absolutely between: the Lady Chichester Hospital (Incorporated), the Royal Hospital and Home for Incurables, Putney, Royal London Ophthalmic Hospital (Moorfields Eye Hospital), and Brighton Institution for Deaf and Dumb Children.

The affidavit of Mr. Aspinall, an official of the plaintiff bank, states the following facts. The residuary estate amounts to about 23,000*l.*, which, when invested in authorized securities, would provide an annual income of about 750*l.* The aggregate amount of the annuities payable at the date of this summons is 1,650*l.* a year, and it is impossible to provide for payment of the annuities out of the income of the residuary trust estate. The bank has been advised that the proper course is to value the annuities and to pay the respective annuitants the respective amounts, or, if necessary, abated amounts of the valuation: but it has been also further advised that, on the true construction of the will, difficult questions arise how the valuations are to be made. The bank has had all the annuities valued except the "extra sum of 100*l.* per annum" given to Rose Alice Guinness Sharpe: but there has been excluded from the valuation the share of any accruing annuity to which any annuitant may hereafter become entitled under the will. At the date of the testatrix's death the value of Rose Alice Guinness Sharpe's annuity was 8729*l.*: that of Gordon Vincent's annuity 3115*l.*: that of Ada Vincent's annuity 2591*l.* 5*s.*: that of Maud Vincent's annuity, 2121*l.* 13*s.* 4d.: that of Henry Vincent's annuity, 1591*l.* 5*s.*: and that of John Sharpe's annuity 913*l.* 10*s.* 10*d.*

The affidavit states that the deponent has also ascertained from a firm of actuaries that, although it would be difficult, if not impossible, to value the accruing annuities correctly according to the Government Tables, especially if they were not bequeathed free of duties, it would not be impossible to propound a scheme which would be a reasonable approximation.

The ages of the annuitants vary substantially. Rose Alice Guinness Sharpe is 49 years old, Gordon Vincent 64, Ada Vincent 73, Maud Vincent 68, Henry Vincent 80, and John Sharpe 41. It has been contended by Mr. Hunt for the youngest annuitants that the proper way of dealing with the matter is to value all the annuities and to pay each annuitant, with abatement if necessary, the value so ascertained. He referred me to the case of *In re Cox* (1), in which Simonds J. followed *In re Cottrell.* (2)

I do not doubt that the method adopted in each of these cases for administering the estate was entirely correct on the facts of each case, but in my view no such method ought to be adopted if the testatrix has manifested a contrary intention in her will. I think I must consider whether the testatrix contemplated the state of affairs which has now arisen, and if so, whether she manifested an intention that such a state of affairs should be dealt with in any particular manner. There are two clauses in the will which throw strong light on the questions which I have to consider. They are, first: "And "I also direct that if at any time the income of my trust fund "shall be insufficient to answer the said annuities recourse "may be had to the capital thereof," and, secondly: "And "I declare that any surplus income of my trust fund not "required to pay the said annuities shall be paid equally "to the charities hereinafter mentioned." In those clauses the testatrix has contemplated two events: first, that, when the residuary trust fund has been constituted, the income from it may be insufficient to provide for the annuities which are for the time being payable, and, secondly, that the income may be more than sufficient to provide for these annuities. The former of these two events has happened, and in my view the testatrix has manifested an intention that in this event the trustees are to draw upon the capital of the trust fund, year by year, in order to pay the annuities in full. It is true

(1) [1938] Ch. 556.

(2) [1910] 1 Ch. 402.

that she has not said "recourse *shall* be had": but she begins the first of the two clauses with the words: "And I also direct". She has foreseen the event which has happened, and in my view she has indicated what is to be done in that event.

There is a very clear distinction between the present case and *In re Cox* (1), where there was no such direction as the one I have just read. In *In re Cox* (1) Simonds J. applied the method of administration adopted in *In re Cottrell* (2) and said: "The question here is whether, in order to do "justice between annuitants inter se, it is necessary that their "annuities should be valued and the amount of the valuation "paid out to them. It is I think quite clear that where the "estate is inadequate to provide the actuarial amount of the "annuities according to a proper valuation, then they are "entitled to have their annuities valued and the available "estate distributed among them rateably according to that "value: see *Todd* v. *Bielby* (3); *Heath* v. *Nugent* (4), and "*In re Wilkins.* (5) The reason is clear from a hypothetical "example. Suppose an annuity of 100*l.* is bequeathed to one "annuitant, A, who is ninety years of age, and a similar "annuity to another, B, who is nineteen years of age, and "suppose that the whole estate available for satisfaction of "the annuities is only 1,000*l.* If both the income and the "capital of that sum are applied year by year until it is exhausted in payment of the two annuities, A will probably "get his annuity paid in full for the whole of his life, but B "will not do so. There is thus an inequality in the treatment "which the testator is presumed not to have intended. "The only fair way of dealing with annuities as between "annuitants of different ages is to make an actuarial "valuation of the annuities, and to pay the value of each so "ascertained to the annuitants, as was done in the cases last "cited."

I agree that a testator is not to be presumed to have intended

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(1) [1938] Ch. 556, 562.
(2) [1910] 1 Ch. 401.
(3) (1859) 27 Beav. 353.
(4) (1860) 29 Beav. 226.
(5) (1884) 27 Ch. D. 703.

MORTON J.

1939

DE CHASSIRON, *In re.* LLOYDS BANK, LD. *v.* SHARPE.

a fund to be applied in the manner described by the learned judge, in the absence of words in the will which clearly reveal such an intention. In the present case, however, I think that the testatrix did intend her trust fund so to be applied. She may be taken to have known the approximate ages of her sisters, brother, nephew and niece.

In *In re Cottrell* (1), a testatrix, by her will, after giving certain pecuniary legacies, bequeathed to her husband an annuity of one pound a week during his life, and directed her trustees to appropriate and set apart and invest such sum of money as would when invested produce by the income thereof an annual sum equal to the amount of the annuity and to apply the income or (if necessary) the corpus of the fund so appropriated in payment of the annuity, which sum should on the dropping of the annuity fall into and form part of her residuary trust estate: and she devised and bequeathed the residue of her real and personal estate to her trustees upon trust for sale and conversion and payment of her debts, funeral and testamentary expenses and legacies, and to invest the moneys which should remain in certain investments, and to hold such investments upon certain trusts for the benefit of her son. The estate of the testatrix was insufficient to pay the pecuniary legacies and to set apart a sum sufficient to answer the annuity to her husband in full. It was, however, sufficient to pay the pecuniary legacies and the value of the annuity as at the date of her death. Warrington J. (as he then was) held that the proper course for the trustees to adopt was to value the annuity as at the date of the death of the testatrix according to the Government scale and to pay the amount of such valuation to the annuitant or invest it in the purchase of an annuity, as he should choose, and to pay the pecuniary legacies in full. Simonds J., in *In re Cox* (2), referring to *In re Cottrell* (1) said: "The estate was "realized and the trustees had in their hands the sum of "1250*l*. Now comes the fact which was of vital importance. "That sum was insufficient to pay the pecuniary legacies in "full and to enable a sufficient sum to be set aside and

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(1) [1910] 1 Ch. 402.

(2) [1938] Ch. 556, 563.

"invested in trust securities to produce the annuity. It was, "however, sufficient to pay the pecuniary legacies in full "and the value of the annuity as at the date of the death of "the testatrix. Warrington J. held that the proper course "was to value the annuity as at the death of the testatrix "according to the Government scale, to pay the amount of "such valuation to the annuitant, and to pay the pecuniary "legacies in full. The learned judge thought that thus only "could justice be done to all three classes of beneficiaries: "the legatees would be paid in full, the annuitant would get "the value of his annuity, and there would remain a residue "to which the residuary legatee would be entitled. Logically "I can see no reason why, if that is the rule to be followed "where there is competition between legatees and an "annuitant and the residuary legatees as in *In re Cottrell* (1) "it should not also be the rule where the competition is "between annuitants inter se and residuary legatees. To "introduce a different rule in the latter case is a refinement "which is calculated to cause confusion. Therefore I propose "to follow, not to distinguish, *In re Cottrell.* (1)"

With those observations of the learned judge I respectfully agree. The cases of *In re Cox* (2) and *In re Cottrell* (1) are, however, distinguishable from the present case, because in the present case the testatrix has made express provision for the event which has happened. The testatrix's intention can be carried out exactly, though it is true that in the process the fund may be exhausted with the possible result that the older annuitants will be paid in full and the younger will not.

I have been referred also to *In re Nicholson* (3) and *In re Farmer.* (4) In each of these cases there was a direction in the will which could not be carried out, and I find nothing in either of them to lead me to a conclusion other than that at which I have arrived. I therefore hold that there should be no valuation of the annuities, but that the annuities should be paid, year by year, out of the income of the trust fund, and, if the income is insufficient in any year, out of the capital thereof.

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(1) [1910] 1 Ch. 402.
(2) [1938] Ch. 556.
(3) [1938] 3 All E. R. 270.
(4) [1939] 1 Ch. 573.

Solicitors: *Quicke & Card, for Cockburn, Gostling & Co., Hove; Simon, Haynes, Barlas & Ireland; Wilfred Light & Co.; Farrer & Co.*

K. R. A. H.

MORTON
J.

1939
May 18, 19.

In re BROWN'S SETTLEMENT.

PUBLIC TRUSTEE *v.* BROWN.

[1939. B. 568.]

Power of appointment—Special power—Release of power to appoint in favour of named object—Later appointment in favour of same object—Validity—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 155.

By s. 155 of the Law of Property Act, 1925: "A person to "whom any power, whether coupled with an interest or not, is "given may by deed release, or contract not to exercise, the "power."

A person having power to appoint a fund by deed or will among all or any of his or her issue may by a voluntary deed release the power to appoint in favour of a named object of the power.

A settlement contained trusts for the settlor's issue as the survivor of the settlor and his wife should by deed or will appoint. The settlor predeceased his wife, leaving children and grandchildren. His wife by deed poll released all the funds comprised in the settlement from her power to appoint in favour of one of the grandchildren and later, by her will, purported to appoint in favour of the same grandchild. After the wife's death the Public Trustee, as the then trustee of the settlement, took out a summons asking (inter alia) whether the release precluded the widow from appointing thereafter, under the power in the settlement, in favour of the grandchild:—

Held, that the release was valid and precluded her from so appointing.

Observations of Cozens-Hardy M.R. in *In re Evered* [1910] 2 Ch. 147, considered.

ADJOURNED SUMMONS.

By a settlement dated September 18, 1895, and made between William Wallace Brown (hereinafter called "the "settlor") of the one part and Charles Franklin Brown of the other part, a trust fund was settled on trust to pay the income to the settlor's wife, Mary Brown, for life, then to the settlor and, after the death of both of them, in trust for the settlor's issue, born in his lifetime, by his then or any future wife, not before attaining twenty-one years of age or marrying, in such shares and manner as the survivor of the settlor and his wife should by deed or will appoint and, in default of appointment or so far as it should not extend, in trust similarly for any such child or children if more than one in equal shares. The settlement contained a hotchpot clause and an ultimate trust in favour of the settlor absolutely, should there be no child to take. The settlor predeceased his wife on January 1, 1914. He was survived also by a son, Leslie Wallace Brown, and two daughters, all of whom were defendants to this summons, and were born during his life and were over twenty-one years of age at the date of this summons. The settlor was survived also by grandchildren, of whom one was Constance Ethelwyn Brown, later Mrs. Constance Ethelwyn White, a daughter of Leslie Wallace Brown and a defendant to this summons.

On August 21, 1928, Mrs. Mary Brown, the settlor's widow, executed a deed poll by which she released all the trust funds comprised in the settlement of 1895 from her power of appointment in favour of Mrs. Constance Ethelwyn White. By her will dated September 15, 1937, she purported to appoint that one-third of the trust funds comprised in the settlement should be held upon trust to pay the income thereof to Leslie Wallace Brown for life and thereafter upon trust as to capital and income for Mrs. Constance Ethelwyn White absolutely.

The settlor's widow died on April 19, 1938, and by this summons the Public Trustee, as the then trustee of the settlement of 1895, asked (inter alia) whether the release of August 21, 1928, precluded the widow from appointing thereafter in favour of Mrs. Constance Ethelwyn White under the power in the settlement.

Geoffrey Cross for the Public Trustee.

F. Bower Alcock for the son, Leslie Wallace Brown. The only possible way of attacking such a release as the one before the Court in the present case is by alleging that it is fraudulent: but a release of this kind is not fraudulent, nor is a partial release. [He referred to *In re Somes.* (1)]

G. C. Dare, for the daughters, referred to *In re Evered.* (2)

(1) [1896] 1 Ch. 250.

(2) [1910] 2 Ch. 147, 156.

In the present case, the intention of the release is very clearly expressed. The Court will always try to find that a deed has some operation, rather than say it is void. [He referred to s. 155 of the Law of Property Act, 1925.] These covenants not to exercise powers are always treated as releases pro tanto. [He referred to Norton on Deeds, 2nd ed., p. 56, and Farwell on Powers, 3rd ed., p. 19.] If it is suggested that this release would be good if it was a covenant, then it is submitted that it is a covenant: Norton on Deeds, 2nd ed., pp. 532, 539, 540. It is necessary to look only at the deed itself, not at anything outside it.

E. M. Winterbotham for the granddaughter. The release is ineffective. A power of appointment can be released with regard to a part of the property: but it cannot be released with regard to one or more objects of the power: *In re Evered.* (1) In Sugden on Powers, 8th ed., p. 83, it is stated that "It seems to have been doubted whether a power can "be released in part; but there appears to be no sufficient "foundation for the doubt." It is probable that that observation applies only where part of the property which is subject to the power is released from it: *Digges's Case* (2); see also the judgment of Sir Edward Sugden L.C. in *Green* v. *Green.* (3)

There is no doubt that a power over part of a fund can be released generally, but in the present case the donee of the power is really giving herself a new power altogether; so she cannot in that respect partly release the power. Either the document is a release, or it is nothing. It cannot be read as a covenant which can be enforced specifically in equity: see *Green* v. *Green* (4), which was approved in *In re Chambers* (5); see also *Stuart* v. *Kennedy.* (6)

F. Bower Alcock in reply. In the present case the power can be released qua the trust fund. The result of all the cases has been a slow modification of the principles quoted from the earlier cases.

Sect. 155 of the Law of Property Act, 1925, refers just as much to a release as to a covenant. There is no reason why a partial release should not be quite as good as a partial covenant.

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(1) [1910] 2 Ch. 147, 156, 161.
(2) (1600) Mo. 603.
(3) (1845) 2 Jo. & Lat. 529, 537, 541.
(4) 2 Jo. & Lat. 529, 540-542.
(5) (1847) 11 Ir. Eq. Rep. 518.
(6) (1850) 3 Ir. Jur. 305.

MORTON
J.

1939

BROWN'S SETTLEMENT, *In re.*
PUBLIC TRUSTEE *v.* BROWN.

MORTON J. This summons raises an interesting question in regard to a partial release of a special power of appointment, which does not appear to be covered by any authority.

On September 18, 1895, an indenture of settlement was made between William Wallace Brown of the one part and Charles Franklin Brown of the other part. It was a settlement of certain securities and the trusts were as follows: "The trustee"—that is Charles Franklin Brown—"shall pay the income of the trust funds to Mary Brown "the wife of the said William Wallace Brown during her "life for her separate use and so that she shall not have "power to dispose thereof in the way of anticipation and "after her death shall pay the said income to the said "William Wallace Brown if he shall survive her"—William Wallace Brown in fact pre-deceased Mary Brown—"and "from and after the death of the survivor of them the said "Mary Brown and William Wallace Brown shall stand "possessed of the trust funds in trust for all or any one "or more of the issue of the said William Wallace Brown "as well by the said Mary Brown as by any future wife "(such issue being born in the lifetime of the said William "Wallace Brown) at such ages or times age or time (not being "earlier as to any object of this power than his or her age "of twenty-one years or day of marriage) in such shares if "more than one and in such manner as the survivor of them "the said Mary Brown and William Wallace Brown shall "by deed or will appoint and in default of such appointment "and so far as any such appointment shall not extend in "trust for all the children of the said William Wallace Brown "as well by the said Mary Brown as by any future wife who "being a son or sons shall attain the age of twenty-one years "or being a daughter or daughters shall attain that age or "marry in equal shares and if there shall be only one such "child the whole to go to that one child." Then follows a hotchpot clause and an ultimate trust, if there should be no child to take, for the settlor, William Wallace Brown, absolutely. William Wallace Brown died on January 1, 1914. He was married once only—namely, to Mary Brown, and there were three children of that marriage, all of whom were born during the lifetime of William Wallace Brown and have attained the age of twenty-one years. One of them, Leslie Wallace Brown, is married, and has one child—namely, Constance Ethelwyn White, a defendant to this summons, who was born on May 5, 1909, during the lifetime of William Wallace Brown and is one of the objects of the special power of appointment given to Mary Brown by the settlement of September 18, 1895. On August 21, 1928, Mary Brown executed a deed poll which is described in the opening words thereof as a "release." It begins: "This release is made "by Mary Brown of Enfield House Baring Road Grove Park "in the County of London, Widow." Then there follows a recital of the material parts of the settlement of September 18, 1895, and a recital of the marriage of William Wallace Brown and Mary Brown. Then there is a recital that Leslie Wallace Brown, a son of that marriage, had one daughter born during the lifetime of the said William Wallace Brown—namely, Constance Ethelwyn Brown. Constance Ethelwyn Brown married Mr. White and is the defendant Constance Ethelwyn White. Then the document proceeds: "And whereas the "said William Wallace Brown died on the first day of January "1914 And whereas the said Mary Brown has determined "to release the power of appointment in favour of the said "Constance Ethelwyn Brown which in the events which "have happened is vested in her by the settlement Now "this deed witnesseth that in pursuance of such determination "she the said Mary Brown hereby releases the trust funds "or the stocks funds shares and securities now or at any "time hereafter representing the same from the power of "appointment in favour of the said Constance Ethelwyn Brown "so vested in her as aforesaid." Looking only at the terms of this deed it is, to my mind, in the plainest possible terms a release of the whole of the trust funds from the power of appointment in favour of one member of the class of possible objects of the power, and the intention is declared that she, the said Mary Brown, the donee of the power, may be absolutely precluded from exercising the said power in favour of that particular object of the power.

Mary Brown made her will on September 15, 1937. After certain dispositions, which I need not read, she devised and bequeathed her residuary real and personal estate unto her trustees upon trust for sale and conversion, with power to postpone such sale and conversion; and she directed that out of the clear moneys to arise from such sale and conversion her trustees should pay her debts, funeral and testamentary expenses and the legacies given by that her will or any legacies given by any codicil thereto and the duties on all legacies given free of duty. The will proceeded (clause 5): "and subject thereto my trustees shall stand possessed of the "proceeds of sale calling in and conversion of my said real and "personal estate and any money belonging to me at my "death and any part or parts of my said real and personal "estate for the time being unconverted (hereinafter called "my residuary estate) upon the following trusts namely: "(*a*) My trustees shall divide my residuary estate into three "equal shares or parts and shall pay or apply one equal third "share or part to my said daughter Kathleen Isabel Brown "absolutely (*b*) My trustees shall stand possessed of another "equal third share or part of my residuary estate or of the "investment representing the same (hereinafter called 'the "'L. W. Brown Fund') upon trust for my son Leslie Wallace "Brown and his daughter the said Constance Ethelwyn White "upon the trusts and subject to the conditions hereinafter "mentioned (*c*) My trustees shall stand possessed of the "remaining one third share or part of my residuary estate "(hereinafter called 'the I. E. Stafford Fund') upon trust "for my daughter Irene Ethelwyn Stafford and her sons "upon the trusts and subject to the conditions hereinafter "mentioned." Leslie Wallace Brown, Kathleen Isabel Brown and Irene Ethelwyn Stafford were the three children of the marriage of William Wallace Brown and Mary Brown.

MORTON J.

1939

BROWN'S SETTLEMENT, *In re.*

PUBLIC TRUSTEE *v.* BROWN.

Clause 6 is in the following terms: "My trustees shall stand "possessed of the L.W. Brown Fund upon the trusts following "that is to say: (*a*) To pay the income thereof to my said "son Leslie Wallace Brown during his life and from and after "his death (*b*) Upon trust as to both capital and income for "his said daughter Constance Ethelwyn White absolutely." Clause 7 sets out the trusts of the I. E. Stafford Fund which are in favour of Irene Ethelwyn Stafford during her life and after her death upon trust in favour of her two sons. I need not read that at length; but there is the following provision: "And in the further event of both the said sons failing to attain "the age of twenty-five years and dying without leaving "issue who attain the age of twenty-one years then the I. E. "Stafford Fund shall go and accrue in equal proportions to "augment the share of my residuary estate given to my said "daughter Kathleen Isabel Brown and the L. W. Brown "Fund respectively." Clause 8 is as follows: "In exercise "of the power conferred upon me by a settlement dated the "eighteenth day of September One thousand eight hundred "and ninety-five and made between my husband William "Wallace Brown of the one part and Charles Franklin Brown "of the other part I hereby appoint that the trust funds shall "be held by the trustee or trustees for the time being of the said "settlement upon similar trusts mutatis mutandis as those "declared by clauses 6 and 7 of this my will in respect of my "residuary estate in favour of my said daughter Kathleen "Isabel Brown my said son Leslie Wallace Brown and his "daughter and my said daughter Irene Ethelwyn Stafford "and her sons as therein mentioned." For reasons which I shall state hereafter I have no doubt that the reference to clauses 6 and 7 of the will was intended to be a reference to clauses 5, 6 and 7 of the will and that I ought to supply in this case a reference to clause 5. But, apart altogether from that question, it is to be observed that the testatrix, having in 1928 released the trust fund from the power of appointment in favour of Constance Ethelwyn White, has by clause 8 appointed that one-third of the settlement fund over which she has this special power of appointment shall be held upon trust to pay the income to Leslie Wallace Brown during his life and from and after his death upon trust as to both capital and income for Constance Ethelwyn White absolutely.

Mary Brown died on April 19, 1938; and the first question which I have to decide is whether the release of August 21, 1928, operated to preclude Mary Brown from making any appointment thereafter in favour of the defendant Constance Ethelwyn White under the power of appointment reserved to Mary Brown by the settlement of 1895.

I have been referred to the judgments of the Court of Appeal in *In re Evered* (1), and in particular to those of Cozens-Hardy M.R. and of Buckley L.J. The Master of the Rolls, after dealing with the particular case which he had to decide, proceeded: "I think it will be convenient to "state shortly some of the propositions which are either "elementary and beyond dispute or which have been so "settled by authority as to bind us. In the first place, a "power to appoint by will cannot be executed by deed. In the "second place, a covenant to appoint by will in a particular "way cannot be the subject of specific performance or have any "legal operation: *Palmer* v. *Locke.* (2) In the third place, an "exercise of the power by will is not rendered invalid by "reason of the fact that the appointor has covenanted to make "such an appointment, there being no other circumstance "which might render the appointment invalid apart from the "covenant: see *Palmer* v. *Locke.* (2) In the fourth place, "a release by the appointor, or a covenant by the appointor "not to exercise the power, is not open to objection even "though the effect of the release is for the benefit of the "appointor. This is expressly enacted by the Conveyancing "Act, 1881, s. 52, and decided by this Court in *In re Little* (3), "and *In re Radcliffe.* (4) In the fifth place, such a release or "covenant may apply either to the whole of the settled "property or to a part only, leaving the power intact as to "the rest of the property." Pausing there, it is manifest that the Master of the Rolls has not dealt with the case which

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(1) [1910] 2 Ch. 147, 156, 157, 161.
(2) (1880) 15 Ch. D. 294, 303.
(3) (1889) 40 Ch. D. 418.
(4) [1892] 1 Ch. 227.

I have to decide, which is a case where the donee of the power purported to release the trust fund from the power of appointment in favour of one particular object of the power. Then the Master of the Rolls proceeds: "In the sixth place, "the appointor may covenant not to exercise his power in "favour of a particular object of the power, and in such case "the power could thereafter only be exercised subject to the "fetter or limitation thus imposed by the negative covenant." It is to be noted that when the Master of the Rolls is dealing with a release of the whole or a part of the settled property he uses the words "a release or covenant," but when he is dealing with the case where it is intended to exclude any particular object of the power from any appointment he uses the words "the appointor may covenant." Mr. Winterbotham, who has argued that the release of 1928 is of no effect, has relied upon that as indicating that, while there may be a release of a power of appointment so far as regards a part of the property, there may not be a release of the power of appointment so far as regards one or more of the objects of the power. It is clear that the Master of the Rolls did not state the law in regard to the precise point which I have to decide, but I think his judgment is of great assistance to me, for reasons which I shall state shortly. Buckley L.J. said: (1) "The law is that the donee of a power "exercisable only by will cannot by deed appoint or do any "act equivalent to appointing the fund or any part of it. He "cannot affirmatively by deed affect the fund in any way. "But he can by deed negatively tie his own hands as to the "manner in which he shall thereafter exercise his testamentary "power. He can release his power or covenant that he will "never exercise it (which will be equivalent to a release), "or can covenant that he will not exercise it so that a defined "distribution of the fund or of some part of it shall not result. "Thus he may covenant that a particular beneficiary shall "not have less than a certain share. In such a case he will "retain his power over the whole fund, but he will be "restricted as to the use of the power. He will remain at

(1) [1910] 2 Ch. 147, 161.

"liberty to exercise the power by appointing by will to that "beneficiary the named sum or share, or by so appointing "by will to other beneficiaries as that there shall remain "unappointed such a sum as, with the assistance of a hotchpot "clause, if any, shall result in the particular beneficiary "receiving the named sum or share. But he will by reason "of his covenant be precluded from so exercising the power "as that his covenant shall be defeated. Any act purporting "to be an exercise of the power which will defeat the "covenant will be an invalid exercise of the power to the "extent to which the covenant will be defeated. Subject "to what I have to say as to *Davies* v. *Huguenin* (1), all the "authorities seem to me consistent with this view of the law." If, as Buckley L.J. says, the donee of a power may covenant that a particular beneficiary shall not have less than a certain share, it seems to follow that the donee of the power may covenant that a particular beneficiary shall not have any share at all. But, there again, one finds that the judgment refers to a covenant, and the learned Lord Justice does not deal with a release of the power to appoint in favour of a particular object of the power.

The other cases to which I have been referred are, first of all, *In re Somes* (2), which decided that "the fact that a release of a "limited power of appointment will result in a benefit to the "donee of the power is not sufficient to make the release "fraudulent and void. The doctrines applicable to the "fraudulent exercise of a power of appointment do not apply "to the release of a power not coupled with a duty." In that case Chitty J. said: ". . . . I may say that it appears "to me that there is a fallacy in applying to a release of a "power of this kind the doctrines applicable to the fraudulent "exercise of such a power. There is no duty imposed on the "donee of a limited power to make an appointment; there "is no fiduciary relationship between him and the objects "of the power beyond this, that if he does exercise the power "of appointment, he must exercise it honestly for the benefit "of an object or the objects of the power, and not corruptly

(1) (1863) 1 H. & M. 730.

(2) [1896] 1 Ch. 250, 255.

"for his own personal benefit; but I cannot see any ground "for applying that doctrine to the case of a release of a power; "the donee of the power may, or he may not, be acting in his "own interest, but he is at liberty, in my opinion, to say "that he will never make any appointment under the power, "and to execute a release of it." Thus it appears that the donee of a power is not in a fiduciary relationship to the class who are objects of the power. He can release the power so that he will be precluded thereafter from exercising it in favour of any of the objects. That being so, it seems to me that there is no logical reason for holding that he cannot release the power to a limited extent so as to preclude himself from afterwards making an appointment in favour of one particular object of the power. Mr. Winterbotham has referred me to Sugden on Powers, 8th ed., pp. 82 and 83, and in particular to the following passage: "It seems to "have been doubted whether a power can be released in part; "but there appears to be no sufficient foundation for the "doubt." At first sight that passage would seem to be helpful, but Mr. Winterbotham has referred me to the case cited, which is *Digges's* case (1), and I think he is right in saying that the observation of the learned author probably applies only to a release of a part of the property which is subject to the power. I cannot base my decision upon that passage. Mr. Winterbotham has also referred me to *Green* v. *Green* (2), and in particular to a passage in which Sir Edward Sugden L.C., said: "There is no doubt upon the authorities, "that a man having a power, may bind himself not to execute "it, save subject to particular restrictions and conditions. "He may release it altogether; or covenant to execute it in a "particular manner; and the Court will give effect to such "a covenant. Where the donee of the power restricts and "limits himself in the execution of it, he must execute it "accordingly, or not at all." Mr. Winterbotham relies on that passage by reason of the contrast in the phrase "He may "release it altogether; or covenant to execute it in a "particular manner." But I do not think there is any limit

(1) (1600) Mo. 603.

(2) (1845) 2 Jo. & Lat. 529, 541.

upon the generality of the words which follow: "Where the "donee of the power restricts and limits himself in the execution "of it, he must execute it accordingly, or not at all." I see no reason why I should read these words as being directed only to a restriction and limitation by covenant. They are equally applicable, in my view, to a restriction or limitation imposed by a deed which is not a deed of covenant. I do not think I need refer to the other cases cited by Mr. Winterbotham of *In re Chambers* (1), and *Stuart* v. *Kennedy* (2), as I do not think they carry the matter any further.

It is clear from *In re Evered* (3), and the summary of the law which I have quoted from that case that an appointor may covenant not to exercise his power in favour of a particular object of the power, and that in such a case the power can be exercised only subject to the fetter or limitation imposed by the covenant. The reason why a covenant can have this effect is stated in Farwell on Powers, 3rd ed., p. 19, as follows: "The powers to which the rule refers"—that is the rule which appears on p. 16 of the edition—"may "be affected either by dealings inconsistent with their exercise "or by express or implied release. A covenant or agreement "not to execute a power operates, in equity, either entirely "or pro tanto, as the case may be, as a release of the power." He then cites *Hurst* v. *Hurst* (4), and *Davies* v. *Huguenin* (5), and proceeds: "And a covenant may have this effect, "although it is merely voluntary." It appears to me that if a covenant not to execute a power operates in equity as a release of the power pro tanto and if a covenant may have this effect, although it is merely voluntary, there can be no good reason why a donee should not achieve the same result by executing a release which is not in the form of a covenant. By s. 155 of the Law of Property Act, 1925, it is provided: "A person to whom any power, whether coupled with an "interest or not, is given may by deed release, or contract not "to exercise, the power." In the present case, in the events which have happened, Mary Brown had a power to appoint amongst a number of people of whom Constance Ethelwyn White was one. She chose to release the property subject to the power from any power she had to appoint in favour of Constance Ethelwyn White. I can see no reason why that document should be invalid, and I propose to hold, in the absence of any authority deciding the matter one way or the other, that the release of 1928 operated to preclude Mary Brown from making any appointment thereafter in favour of the defendant, Constance Ethelwyn White.

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(1) 11 Ir. Eq. Rep. 518.
(2) (1850) 3 Ir. Jur. 305.
(3) [1910] 2 Ch. 147.
(4) (1852) 16 Beav. 372.
(5) 1 H. & M. 730.

As I have already indicated, I think clause 8 of this will, which refers to the trusts declared by clauses 6 and 7 of the will, ought to be read as including a reference also to clause 5. I think the present case comes precisely within the principle stated, as follows, in Jarman on Wills, 7th ed., p. 556: "Where it is clear on the face of a will that the testator has "not accurately or completely expressed his meaning by the "words he has used, and it is also clear what are the words "which he has omitted, those words may be supplied in order "to effectuate the intention, as collected from the context." In the present case I think it is abundantly clear that the testatrix intended to insert the number "5" before the number "6" in clause 8. She refers in clause 8 to "similar "trusts mutatis mutandis as those declared by clauses 6 and "7 of this my will in respect of my residuary estate in favour "of my said daughter Kathleen Isabel Brown my said son "Leslie Wallace Brown and his daughter and my said daughter "Irene Ethelwyn Stafford and her sons as therein mentioned." If one inserts a reference to clause 5 that is a perfectly clear and sensible clause; by clauses 5, 6 and 7 trusts were declared in respect of the residuary estate in favour of the persons named: on the other hand, if clause 5 is omitted, trusts are not declared of the residuary estate but of the L. W. Brown Fund and the I. E. Stafford Fund, and nothing is given to Kathleen Isabel Brown except an ultimate remainder in one-half of the I. E. Stafford Fund in a certain event therein mentioned. I cannot believe that the testatrix intended clause 8 to have so limited an operation so far as Kathleen

Isabel Brown is concerned. Moreover, unless I insert a reference to clause 5, I think it is uncertain what shares of the appointed fund are dealt with by clause 8. For these reasons I have no hesitation in reading clause 8 as containing a reference to clause 5 as well as to clauses 6 and 7.

The costs of all parties, as between solicitor and client, will come out of the capital of the funds subject to the trusts of the settlement.

Solicitors: *Alfred Powell; Long & Gardiner; Goodman, Brown & Co.; Rochester Pusey & Co.*

K. R. A. H.

MORTON J.

1939

May 24;
June 28.

DAPONTE *v.* SCHUBERT AND ROY NOMINEES, LIMITED.

[1938. D. 1872.]

Shares—Charging order—Foreclosure—Sale—Practice—Convenience—Jurisdiction—Judgments Act, 1838 (1 *&* 2 *Vict. c.* 110), *s.* 14.

By s. 14 of the Judgments Act, 1838: " . . . . if any person "against whom any judgment shall have been entered up . . . . "shall have . . . . any . . . . shares . . . . in any public company . . . . "standing in his name in his own right, or in the name of any "person in trust for him, it shall be lawful for a judge . . . . "on the application of any judgment creditor, to order that such ". . . . shares, ... shall stand charged with the payment of "the amount for which judgment shall have been so recovered, "and interest thereon, ..."

The plaintiff obtained a charging order on shares of which he had been fraudulently deprived. He took out a summons asking for an order for foreclosure on them and for a transfer of them to himself or, alternatively, for enforcement of the charging order in such other way as the Court might think fit:—

Held, that the case was one in which the Court ought, if it had jurisdiction, to grant relief by way of foreclosure, but that, in the interests of judicial comity, the Court would follow the decisions that the remedy of any one having a charge under the section was sale and not foreclosure.

D'Auvergne v. *Cooper* [1899] W. N. 256, and *Attwood* v. *Gibbons* (unreported, 1927 A. 344), followed.

Observations of Astbury J., Cozens-Hardy M.R. and Warrington L.J., in *Hosack* v. *Robins* [1917] 1 Ch. 142; 332, and Annual Practice, 1939, p. 849 (*n*), " Sale," considered.

ORIGINATING SUMMONS.

By a contract dated March 8, 1937, Mr. Demetre Daponte (hereinafter called " the plaintiff ") agreed to sell to Mr. Sami Wickersham Schubert (hereinafter called " the first defendant") shares for which the first defendant gave him, in part payment, a cheque which was dishonoured. The first defendant disposed of more than half of the shares. On August 12, 1937, the plaintiff obtained judgment for the amount of the cheque and costs and a charging order under s. 14 of the Judgments Act, 1838, for the amount due on the judgment on the first defendant's interest in the remaining shares, which, at the date of this summons, were standing in the name of Roy Nominees, Ld. (hereinafter called "the nominees").

The nominees were originally nominees for the plaintiff, who later authorized them to deal with the shares in accordance with the first defendant's instructions: and it was because of that authorization that more than half of the shares had been dealt with.

By this summons, dated November 18, 1938, the plaintiff asked for an order for foreclosure on all the interest of the first defendant in the remaining shares and for a transfer of those shares to himself or, alternatively, for enforcement of the charging order in such other way as the Court might think fit.

E. M. Winterbotham for the plaintiff. There is no doubt that the plaintiff is entitled to a sale of the shares: but he considers that foreclosure would be a much better thing for him; the question is whether the Court has power to order foreclosure: see Annual Practice, 1939, p. 843, Order 46, r. 1, p. 849 (*n*), "Sale": also, s. 13 of the Judgments Act, 1838, which provides that a judgment shall operate as a charge on real estate, and that it shall not be enforced for a year, and contains a proviso as to purchasers, mortgagees and creditors. It must be admitted that a charge by an owner of real estate, if it be nothing but a charge, does not give a right to foreclosure: but, if it amounts to an agreement to create a mortgage, it does. The foundation for that is that foreclosure destroys the equity of redemption, and is therefore available only where there is an equity of redemption. There has been a lot of discussion whether a mere deposit of title deeds gives a right to foreclosure or is merely a charge: see Ashburner on Mortgages, 2nd ed., pp. 413, 423, 424: but, even with regard to realty, there is authority that foreclosure can be obtained when the charge is under the Judgments Act, 1838, and with regard to personalty that is so, even when the charge is not under that Act, as, e.g., in the case of a debenture.

In *Ford* v. *Wastell* (1), it appears that foreclosure was by consent: but it has been said that consent does not enlarge the Court's jurisdiction. The next case is *Footner* v. *Sturgis* (2),

(1) (1847) 6 Hare 229; 2 Ph. 591. (2) (1852) 5 De G. & Sm. 736.

a definite decision that there should be a sale only. That is undoubtedly, so far as it is applicable, a definite decision against the view now being submitted: but, at nearly the same time, there was decided *Jones* v. *Bailey* (1), which appears to be to exactly the opposite effect, though in *Kennard* v. *Futvoye* (2) it appears that in fact the order made in *Jones* v. *Bailey* (1) was an order for sale, and not the usual foreclosure order. In *Messer* v. *Boyle* (3) Sir John Romilly M.R. held that the plaintiff was entitled to foreclosure, but gave no reason for so holding.

These are all the authorities on the section of the Judgments Act relating to land which makes the judgment a charge automatically. The next thing is the effect of a charging order under the other section. The authorities begin with *Leggott* v. *Western* (4), in which an attempt was made to obtain enforcement of a charging order in the action in which the order had been made. It was held that that cannot be done, and that enforcement must be sought in the Chancery Division: and the judges of the King's Bench Division seemed to treat foreclosure and sale indiscriminately. In *D'Auvergne* v. *Cooper* (5), North J. held that it was settled law that the proper remedy of any one with a charge under s. 14 was sale, not foreclosure. In *Hosack* v. *Robins* (6) the plaintiff, if he was merely asking for sale, was asking for something for which he did not need to obtain leave. But if he was asking for sale in lieu of foreclosure, that was a thing prevented by the Courts Emergency Powers Act, and on this footing the defendant succeeded. The dictum (if dictum it be) of Cozens-Hardy M.R. was that North J. was wrong in limiting the jurisdiction of the Court in such a case. In the Annual Practice, 1939, p. 849, is the following note: " The Court has no jurisdiction to order "the sale or foreclosure of shares comprised in a charging "order, except in a separate proceeding instituted for that "purpose. *Leggott* v. *Western* (4) . . . . The proceedings "must be commenced in the Chancery Division . . . . they

(1) (1853) 17 Beav. 582.
(2) (1860) 29 L. J. (Ch.) 553.
(3) (1855) 21 Beav. 559.
(4) (1884) 12 Q. B. D. 287.
(5) [1899] W. N. 256.
(6) [1917] 1 Ch. 142; 332.

"should be commenced by originating summons under "Order 55, r. 5A. Sale, and not foreclosure, is usually ordered. "*D'Auvergne* v. *Cooper* (1), but this is a rule of practice only, "and semble in a proper case foreclosure could be ordered: "per Cozens-Hardy M.R. in *Hosack* v. *Robins* (2): see "Order 55, r. 5A."

There is also a note, made by Master Ridsdale, of certain observations of Eve J. in *Attwood* v. *Gibbons.* (3)

[MORTON J. The note in question was made on May 2, 1927, and states that the learned judge said that *D'Auvergne* v. *Cooper* (1) should be followed, notwithstanding the observations of Cozens-Hardy M.R. in *Hosack* v. *Robins* (4), which were obiter. The actual application on the summons was for sale or for such other order as to the Court might seem fit. The Master's note when the case came before him was: "It "appears to me that as *Hosack* v. *Robins* (4) does not over-"rule what North J. said in *D'Auvergne* v. *Cooper* (1), but "merely comments on it, I ought to refer this case to Eve J. "as an application for foreclosure." It is plain that, before the Master, the plaintiff asked for foreclosure, and that the Master thought that the matter ought to be referred to the judge: and Eve J. then made the observations in question.]

It is somewhat embarrassing to a practitioner to be confronted with a position of this kind. It may be that the Master took the view that there was not an actual rule that the Court has no jurisdiction to make the foreclosure order, but only that, normally, it would not. If he took the other view, the rule has been allowed to be misstated in the Annual Practice for twelve years.

[MORTON J. It seems to me that in *D'Auvergne* v. *Cooper* (1) North J. held that the remedy was sale and not foreclosure. That seems to be a decision on the point before me. Then come the dicta of the Court of Appeal in *Hosack* v. *Robins* (4), and when the point came before Eve J. he declined to make a foreclosure order. I feel, having regard to the decisions of North J. and Eve J., that it would not be proper for me, in the interests of judicial comity, to decide otherwise.]

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(1) [1899] W. N. 256.
(2) [1917] 1 Ch. 332, 336.
(3) Unreported, 1927 A. 344.
(4) [1917] 1 Ch. 142; 332.

The question is whether the decision of North J. in *D'Auvergne* v. *Cooper* (1) amounts to saying that under no circumstances has the Court jurisdiction to make the order for foreclosure. Unless it does, the Court is not bound to follow the decision.

It is settled law that, where there is nothing but a floating charge, foreclosure can be obtained: *Sadler* v. *Worley*. (2) That was a decision of Kekewich J., and he followed it in *Oldrey* v. *Union Works, Ld.* (3), and *Halifax and Huddersfield Union Banking Co.* v. *Radcliffe, Ld.* (4)

It is now generally accepted that foreclosure can be obtained on a floating charge if application is made by every debenture holder concerned.

The result of the authorities is that there is so little distinction between foreclosure and sale as remedies as to enable the Court to decide that in some cases there should be foreclosure and in other similar cases there should be, not foreclosure, but sale: it can hardly be that the judges had it in their minds that there was a definite remedy, to which there was a right, and another definite remedy to which there was not. The authorities do not go so far as deciding that either remedy is wrong. Taking the authorities as a whole, there is a preponderance of view that the Court has jurisdiction to make whichever order it will, and that all that it need consider is which order is the right one to make in the particular case.

This is really a case of gross fraud on the plaintiff by a defendant who does not desire to come to the Court and justify what he has done.

The first defendant was not represented and did not appear.

J. A. Reid for the nominees. The nominees are entirely in the Court's hands and ask only that they may be protected by an order of some kind.

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(1) [1899] W. N. 256.

(2) [1894] 2 Ch. 170.

(3) [1895] W. N. 77.

(4) [1895] W. N. 63.

MORTON J. By a contract in writing dated March 8, 1937, the plaintiff agreed to sell to the first defendant, 80,000 ordinary shares of 5*s.* each in a company known as Dufay-Chromex, Ld., and the first defendant agreed to pay to the plaintiff 20,000*l.* for the shares. The 20,000*l.* was to be paid as to 10,000*l.* by the first defendant's cheque in favour of the plaintiff and as to the remaining 10,000*l.* by a bill accepted by the first defendant and payable to the plaintiff as therein mentioned. The 80,000 shares were duly delivered to the first defendant, the plaintiff received the first defendant's cheque for 10,000*l.* and a bill accepted by the first defendant also for 10,000*l.* On the presentation of the cheque it was returned by the first defendant's bankers with the words "Orders not to pay" endorsed thereon. The first defendant, however, had dealt with 50,000 of the shares either by sale or charge, and transfers in respect thereof have been registered by the company. I am told by Mr. Reid, who appears for the nominees, that the nominees were originally nominees for the plaintiff, and that subsequently the plaintiff authorized them to deal with the shares in accordance with the first defendant's instructions, and that it was in consequence of that that 50,000 of the shares were in fact dealt with. On June 23, 1937, the plaintiff commenced an action against the first defendant in the King's Bench Division, claiming a sum of 10,000*l.*, being the amount of the dishonoured cheque, and claiming also interest thereon. The action came on for trial on July 28, 1937; the facts were gone into and judgment was given for the plaintiff for 10,065*l.* 15*s.* 1*d.* and costs to be taxed. On August 12, 1937, an Order was made whereby, after reciting that the first defendant was still indebted to the plaintiff in the sum of 10,065. 15*s.* 1*d.* and that there were standing in the name of the nominees on behalf of the first defendant 30,000 ordinary shares of 5*s.* each (and then the numbers were given) it was ordered that the first defendant's interest in those 30,000 shares should stand charged with the payment of the above mentioned sum of 10,065*l.* 15*s.* 1*d.* due under the judgment, together with 3*l.* 5*s.* 6*d.*, the costs of that application, such sum of 3*l.* 5*s.* 6*d.* to be added to the judgment debt. The plaintiff, on November 18, 1938, issued a summons to which the first defendant and the nominees were made defendants, and he asked for an order for foreclosure on all the first defendant's interest in the 30,000 shares in question, and for delivery up to the plaintiff of the certificate or certificates representing the first defendant's title to the shares, together with an executed transfer of them in favour of the plaintiff; alternatively, he asked that the said "charging order may be "enforced in such other way as the Court shall think fit."

In my view, this is most certainly a case in which I ought to give the plaintiff relief by way of foreclosure if I have the jurisdiction to make such an order. The 30,000 shares in question were formerly the property of the plaintiff. He has never been paid for them and he has been deprived of them in the manner which I have set out in my statement of the facts; but the question whether I have in fact any jurisdiction to make an order for foreclosure is one of some importance and also, I think, of some difficulty. Mr. Winterbotham has, most helpfully, referred me to all the authorities he can find which deal with the matter and has also referred me to ss. 13 and 14 of the Judgments Act, 1838. I do not propose to review the cases in detail because this precise point, as I read the report, came before North J. in *D'Auvergne* v. *Cooper*. (1) In that case the plaintiff had recovered judgment in an action in the Queen's Bench Division against the defendant John Edmund Cooper. He obtained a charging order under s. 14 of the Judgments Act, 1838 (made absolute on August 2, 1898), for the amount of his debt on 6606 1*l*. shares in a limited company standing in the name of Edith Cooper, the other defendant, as trustee for the first defendant, her husband. The report states that "This was "an action to enforce the charge, brought in as a short cause, "on notice for judgment in default of appearance. The "plaintiff claimed an account and foreclosure or sale." The report says "on sale," but I think that is clearly a misprint. The report continues: "The shares at present were depreciated "and if they were sold now the purchase money would be

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(1) [1899] W. N. 256.

"insufficient." Counsel for the plaintiff asked that there might be foreclosure. North J., as it is stated in the report, "reviewed the authorities, holding that it was settled law that "the remedy of a person having a charge under s. 14 of the "Judgments Act was sale, not foreclosure. He directed an "account and sale, with liberty for the plaintiff to bid if he "did not have the conduct of the sale." I have inserted the words "to bid" as I think they clearly ought to appear in the report but they do not. It is unfortunate that that case is so briefly reported but, as I read it, it is a decision upon the very point that I have to decide to-day. It appears from the report that counsel asked for foreclosure and the learned judge held that it was settled law that the remedy of the person having a charge under this section was sale and not foreclosure.

In 1916 there came before Astbury J. and the Court of Appeal, *Hosack* v. *Robins*. (1) The point for decision was whether the plaintiff had to obtain leave to take certain proceedings under the Courts (Emergency Powers) Act, 1914, s. 1, sub-s. 1 (*b*), as amended by the Courts (Emergency Powers) (No. 2) Act, 1916, s. 1, sub-s. 1 (*b*), provisions dealing, inter alia, with the power of the Court as to mortgagees and companies. But in the course of the case *D'Auvergne* v. *Cooper* (2) was referred to and there are observations, both in the judgment of Astbury J. and in the judgments of Cozens-Hardy M.R. and Warrington L.J., which would seem to indicate that they did regard the Court as having jurisdiction to make an order for foreclosure in such a case as the present. Those observations were to my mind obiter. But Cozens-Hardy M.R. in particular, said (3): "I regard the "view taken by North J. long ago in the case of *D'Auvergne* v. "*Cooper* (2) that sale and not foreclosure was the proper "remedy of a person having a charge under s. 14 of the "Judgments Act, 1838, as merely a rule of practice, and not a "question of jurisdiction. As a matter of convenience the "Court says that the charge shall be enforced not by fore-"closure but by sale. I guard myself from saying there is

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(1) [1917] 1 Ch. 142; 332.
(2) [1899] W. N. 256.
(3) [1917] 1 Ch. 336.

"any real prohibition which could prevent the Court, if it "thought fit, from granting either foreclosure or a sale in "lieu of foreclosure. If the Court did grant foreclosure, it "could at once, under the statute referred to, make an order "for sale instead of for foreclosure."

The matter does not end there, because in 1927 there came before Eve J., *Attwood* v. *Gibbons* (1), an unreported case, the reference number of which is "1927 A. No. 344." In that case the plaintiff had obtained a charging order absolute dated July 28, 1926, and made in an action in the Probate, Divorce and Admiralty Division, whereby a sum of 144*l.* 7*s.* 6*d.* Consolidated Stock standing in the name of the defendant Gibbons in the books of the Wolverhampton Gas Company stood charged with the payment to the plaintiff of the sum of 1500*l.* and certain costs. The plaintiff, on February 15, 1927, took out a summons, to which Gibbons was a defendant, asking that the stock might be sold, with the approbation of the judge, or that such further or other order might be made in the premises as to the Court might seem just. It appears clearly from the Master's notes in that case that the defendant did not appear, and on April 26, the plaintiff appeared before the Master and asked for an order for foreclosure. The learned Master took the view that *Hosack* v. *Robins* (2) did not overrule the decision of North J. in *D'Auvergne* v. *Cooper* (3), but only commented upon it, and thought that he ought to adjourn the case to the judge. On May 2, 1927, the matter came before Eve J. and the following passage appears in the Master's note: "The judge said *D'Auvergne* v. *Cooper* (3) is to be "followed notwithstanding the observations of the Master of "the Rolls in *Hosack* v. *Robins* (2), which were obiter." It seems to me that that case amounts to this, that again there was an application, by a judgment creditor who had obtained a charging order, for foreclosure instead of sale, and Eve J. declined to make the order and followed *D'Auvergne* v. *Cooper*. (3) It is to be regretted that this case to which I am now referring was not reported. The learned Master does not appear to have brought it to the attention of those responsible for the Annual Practice, because there still appears in the Annual Practice for 1939 the following note, at p. 849: "The Court has no jurisdiction to order the sale or foreclosure of shares comprised in a charging order, except "in a separate proceeding instituted for that purpose. . . . "The proceedings must be commenced in the Chancery "Division; . . . . they should be commenced by originating "summons under Order 55, rule 5A." Now follows the relevant passage: "Sale, and not foreclosure, is usually "ordered (*D'Auvergne* v. *Cooper* (1)), but this is a rule of "practice only, and semble in a proper case foreclosure "could be ordered (per Cozens-Hardy M.R. in *Hosack* v. "*Robins*. (2))"

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(1) Unreported.

(2) [1917] 1 Ch. 142; 332.

(3) [1899] W. N. 256.

I do not propose to discuss in detail the earlier cases referred to by Mr. Winterbotham. The cases to which he referred are, first of all, certain cases on s. 13 of the Judgments Act, 1838, which were concerned with real property. The first of these is *Ford* v. *Wastell*. (3) It appears from the second of the two reports of the case that the order made in the case was a consent order. The next case is *Footner* v. *Sturgis*. (4) Then there was *Jones* v. *Bailey*. (5) The two latter cases are extremely difficult to reconcile with one another. I may add that it would appear from the report of *Kennard* v. *Futvoye* (6) that the decree as actually drawn up in *Jones* v. *Bailey* (5) was for sale and not for foreclosure. The last of the cases on s. 13 to which Mr. Winterbotham referred was *Messer* v. *Boyle* (7) in which, without giving any reason, Sir John Romilly M.R. held that the plaintiff was entitled to a decree for foreclosure.

Mr. Winterbotham also referred me to *Leggott* v. *Western*. (8) In that case the plaintiff had obtained an order charging shares of the defendant in a company with the payment of the judgment debt and interest, and he applied to the Court in the same action for an order for sale of the shares. The

(1) [1899] W. N. 256.
(2) [1917] 1 Ch. 332, 336.
(3) 6 Hare 229; 2 Ph. 591.
(4) 5 De G. & Sm. 736.
(5) 17 Beav. 582.
(6) 29 L. J. (Ch.) 553, 557 (*n*).
(7) 21 Beav. 559.
(8) 12 Q. B. D. 287, 289.

MORTON J.

1939

DAPONTE v. SCHUBERT AND ROY NOMINEES, LD.

decision went only to this, that the application for sale could not be made in the same action in which the order had been made; but Mr. Winterbotham relied upon the following passages. Lopes J. said in his judgment: "It is admitted "that before the Judicature Acts it would have been necessary "for him to institute separate proceedings in order to obtain "a sale or foreclosure of the shares subject to the charging "order." Cave J. said: "The powers given by the Legislature do not extend to enabling the Court to order a foreclosure or sale in a case like the present where that relief is "not claimed in the action." Mr. Winterbotham relied on the fact that in these passages in the judgments the learned judges bracketed together foreclosure and sale and he suggested that that was an indication that foreclosure was an alternative remedy.

I do not propose to express any view as to the question of jurisdiction beyond this, that in my view the point has been considered by North J. and decided against the plaintiff's contention. That decision has already been followed by Eve J. in Chambers in *Attwood* v. *Gibbons* (1), the unreported case to which I have referred, and I think that in the interests of judicial comity I ought to follow it. In these circumstances, I am prepared, if the plaintiff so desires, to make an order for sale: but it may be that the plaintiff will desire to take the matter further to obtain a decision on the question of foreclosure. I have every sympathy with the plaintiff in his desire for foreclosure and, as I have said, if I thought that, on the authorities, I had jurisdiction to make an order for foreclosure, I should do it.

[After discussion, his Lordship made an order for sale, and ordered also that the plaintiff should pay the nominees' costs and add them to his security.]

Solicitors: *Bischoff, Coxe & Co.; Ellis, Peirs & Co.*

(1) Unreported.

K. R. A. H.

MORTON J.

1939 June 30.

In re EVES.

MIDLAND BANK EXECUTOR AND TRUSTEE COMPANY, LIMITED *v.* EVES.

[1939. E. 468.]

Will—Construction—Revenue—Annuity "free of income tax at current "rate for time being deductible at source"—Reliefs and allowances.

A testator's will provided that his trustees should pay to his wife "during her life the yearly sum of one thousand pounds "to be paid free of all duties and free of income tax at the current "rate for the time being deductible at the source by equal "quarterly payments. . . . ."

Held, that the testator's widow was not entitled to keep for herself income tax recovered on the annuity.

In re Pettit. Le Fevre v. *Pettit* [1922] 2 Ch. 765, and *In re Kingcome. Hickley* v. *Kingcome* [1936] Ch. 566, followed.

ADJOURNED SUMMONS.

By his will dated July 24, 1935, Sir Charles Eves (hereinafter called "the testator") provided that his trustees should pay to his wife, Lady Elsie Eves, "during her life the yearly sum "of one thousand pounds to be paid free of all duties and free "of income tax at the current rate for the time being deductible "at the source by equal quarterly payments. . . ."

The testator died on June 6, 1936, and by this summons, taken out on March 30, 1939, the trustees asked whether, on the true construction of the will, the principles laid down or applied in *In re Pettit* (1), and *In re Kingcome* (2), applied to the annuity, or whether the widow was entitled to obtain and retain for herself all the reliefs or allowances from or in respect of income tax to which she might be from time to time entitled in respect of the annuity.

Wilfrid M. Hunt for Midland Bank Executor and Trustee Company, Ld., the Trustees.

S. Parnell Kerr for the widow. In this case the words of the will are different from those in *In re Pettit* (3) and *In re*

(1) [1922] 2 Ch. 765.
(2) [1936] Ch. 566.
(3) [1922] 2 Ch. 765, 766.

MORTON J.

1939

EVES, *In re.* MIDLAND BANK EXECUTOR AND TRUSTEE CO. *v.* EVES.

Kingcome. (1) Here, the widow is not under an obligation to pay back to the trustees any income tax she may receive. If the Court does not accept that argument, it is submitted, alternatively, that *In re Pettit* (2) was wrongly decided. In *In re Pettit* (2) the words were ". . . . upon trust to pay an "annuity of 1000*l.* free of duty and income tax . . . ."; and in *In re Kingcome* (3) they were ". . . . to pay . . . . an "annuity of 365*l.* (clear of all death duties and income tax "and so that such duties shall be payable out of the said "income and not out of capital) . . . ." In the wills in both of those cases the wording was very much the same. There was no such limitation as there is here, namely, "at the "current rate for the time being." Here the direction to the trustees is to pay such sum as, after income tax has been deducted, will leave the widow 1000*l.* a year. The judgment of Romer J. in *In re Pettit* (4) was followed in *In re Kingcome* (3), which was slightly different on the facts. In *In re Kingcome* (3) the widow refused to apply for the allowances to which she was entitled, and the Court held that she was liable to the trustees. In *Richmond's Trustees* v. *Richmond* (5) it was held, in a sense contrary to that of *In re Pettit* (4), that in no case is a beneficiary under any obligation to repay trustees.

In the present case there is a direction to the trustees to pay a sum to the widow to enable her to pay income tax at the standard rate. There is no direction what the widow is to do if she succeeds in obtaining reductions.

Kenneth W. Mackinnon for Miss Pamela Mattinson and Mr. Miles Eves Mattinson, residuary legatees. Trustees are entitled to claim back all relief allowances on a gross annuity which is expressed in the form of a sum which, after the deduction of tax, will leave the whole sum required to pay the annuity : *In re Jones.* (6) Where the testator says " free of " income tax," he desires the beneficiary to receive the money free of income tax, and he expresses it in that form : *In re Pettit.* (4)

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(1) [1936] Ch. 566.
(2) [1922] 2 Ch. 765, 766.
(3) [1936] Ch. 566, 567.
(4) [1922] Ch. 765.
(5) 1935 S. C. 585.
(6) [1933] Ch. 842.

In their ordinary context the words " income tax " include sur-tax as well as income tax : *In re Reckitt.* (1) In *In re Pettit* (2) the point that was being made was that there might have been allowances one way or another, and that it could not be known what the trustees would have to pay until a year had passed, as it could not be known what the sur-tax assessment was.

Where, as in the present case, there is a gift in a very simple form of a specified sum, it would require very strong wording to prove that what the testator desired the beneficiary to have was not just that sum and no more : and where, as here, there are the additional words " at the current rate " indicating merely what ambit the testator intended income tax to have, the case is quite clear.

MORTON J. In this case Sir Charles Eves, the testator, made his will on July 24, 1935, and, after appointing the Midland Bank Executor and Trustee Company, Ld., the plaintiffs on this summons, to be the executors and trustees, and giving various other directions, he gave, devised and bequeathed all the residue of his property whatsoever and wheresoever unto the bank for collection, calling in and conversion, and he directed "that the income of such part of my estate as shall "remain unsold shall as well during the first year after my "death as afterwards be applied as if the same were income "arising from investments hereinafter directed to be made of "the proceeds of sale thereof." Then there was the usual trust for payment of funeral and testamentary expenses, duties and legacies, and the will proceeded: "and shall stand possessed "of the income to arise therefrom and from any part of my "estate which may remain unconverted (all which income is "hereinafter referred to as the ' trust income ') upon the trusts "hereinafter declared My trustees shall (*a*) out of the trust "income pay to my said wife Elsie Eves during her life the "yearly sum of one thousand pounds to be paid free of all "duties and free of income tax at the current rate for the time "being deductible at the source such sum to be paid by equal

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(1) [1932] 2 Ch. 144.

(2) [1922] 2 Ch. 765.

"quarterly payments the first of such payments to be made at "the expiration of three calendar months from my death." I do not think I need read the remainder of the trusts of residue. It is necessary to say only that the second and third defendants, Miss Pamela Mattinson and Mr. Miles Eves Mattinson, are beneficially interested in the residuary estate subject to the payment of the annuity to the testator's widow.

The first question raised by this summons is framed as follows: [His Lordship read it and continued:] In *In re Pettit* (1) the words of the gift were "upon trust to pay "an annuity of 1000*l.* free of duty and income tax"; whereas in *In re Kingcome* (2) in which Bennett J. followed the decision of Romer J., as he then was, in *In re Pettit* (1), the words were "an annuity of 365*l.* (clear of all death duties "and income tax and so that such duty shall be payable out of "the said income and not out of capital.)" Mr. Parnell Kerr on behalf of the widow has argued that the present case is distinguishable from *In re Pettit* (1) because there is added in the present case after the words "free of income tax" the phrase "at the current rate for the time being deductible at the "source." He asks me to hold that those words sufficiently distinguish the present case from *In re Pettit* (1) and make it clear that the annuitant is entitled to retain for her own benefit any reliefs and allowances from or in respect of income tax to which she may be from time to time entitled. Notwithstanding Mr. Parnell Kerr's argument I have arrived at the conclusion that there is no solid ground for distinguishing the present case from *In re Pettit.* (1) I think that Mr. Mackinnon was right in suggesting that the probable reason for inserting the words "at the current rate for the time being "deductible at the source" was to make it quite clear that only income tax payable at the current rate deductible at the source was contemplated by the testator, and that the testator did not intend his wife to have the annuity free of sur-tax if and when, by reason of her having other means, sur-tax should be payable. I do not think it would be right to draw so fine a distinction between the present case and *In re Pettit.* (1)

(1) [1922] 2 Ch. 765.

(2) [1936] Ch. 566.

Mr. Parnell Kerr has submitted in the alternative, if I think that the present case is governed by the decision in *In re Pettit* (1), that the decision in *In re Pettit* (1) was wrong and should not be followed. For my part I respectfully agree with the decision in *In re Pettit* (1), and, even if I doubted its correctness, I should feel inclined to follow it, as it has been already followed by Bennett J. Thinking as I do that there is no ground for distinguishing the present case from *In re Pettit* (1), and agreeing as I do with that decision, I propose to decide that upon the true construction of the testator's will the principles laid down and applied in *In re Pettit* (1) apply to the annuity.

There will be a declaration that the first defendant was and is a trustee of her statutory rights to recover income tax overpaid in respect of the said annuity and was and is bound, at the request of the plaintiffs, to sign all proper forms and documents for that purpose, and a direction by the Court that the first defendant do pay to the plaintiffs all tax recovered, or enable them to obtain payment thereof, with liberty to apply.

The costs of all parties as between solicitor and client will come out of the estate.

Solicitors: *Timbrell, Deighton & Nichols; J. A. E. Harrisson & Co.*

K. R. A. H.

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(1) [1922] 2 Ch. 765.

LUXMOORE L.J.

1939

July 25, 28.

In re WALKER.

PUBLIC TRUSTEE *v.* WALKER.

[1939. W. 1415.]

Will—Annuity—Forfeiture on alienation and gift over—Annuitant adjudicated bankrupt in testator's lifetime—Discharge suspended till after testator's death—No income available for payment until after discharge—Forfeiture effective—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *ss.* 28, 38*—Bankruptcy* (*Amendment*) *Act,* 1926 (16 *&* 17 *Geo.* 5, *c.* 7), *s.* 1.

A testator directed the trustee of his will to pay an annuity to L. W. during his life until he should assign, charge or otherwise dispose of it, or should become bankrupt, and then to pay the annuity to the children of L. W. in equal shares.

At the date of the testator's death L. W. had been adjudicated bankrupt and had just applied for his discharge. An order was made suspending the discharge for a month and it took effect after the testator's death:—

Held, that, although L. W. was not entitled to receive any income, and there was no income available for payment of the annuity until after his discharge, the forfeiture clause operated as from the testator's death, and the annuity vested in the children of L. W.

SUMMONS.

The facts were stated by the learned judge as follows: By his will dated December 28, 1931, John Walker directed the Public Trustee (who was appointed executor and trustee of his will) "to pay out of the income of my estate the sum "of 250*l.* per annum to my brother Leonard Unett Walker "during his life until he shall assign charge or otherwise "dispose of the said income or some part thereof or become "bankrupt or do something whereby the said income if belonging to him or some part thereof would become payable to or "vested in some other persons whichever of the said events "first happens and if the trusts hereinbefore declared shall fail "in the lifetime of my said brother my trustee shall pay the "said sum of 250*l.* per annum to all the children of my said "brother in equal shares during the lifetime of my said brother "And I declare that my trustee shall pay the sum of 250*l.*

"to the personal representatives of my brother for one year "after his death for the benefit of his family."

The testator died on November 16, 1938, and his will was proved by the Public Trustee on March 14, 1939. The testator's brother, Leonard Unett Walker, survived him. He has had three children—namely, the defendants, Marguerite Kathleen Iris Marshall, John Bryan Walker and Penelope Ann Walker. He was adjudicated bankrupt on September 29, 1937, and he applied for his discharge in bankruptcy. On November 15, 1938, the day before the testator's death, an order was made in the Kent County Court, holden at Canterbury, whereby it was ordered "that the bankrupt's discharge "be suspended for one month and that he be discharged as "from December 15, 1938."

The question raised by the summons was whether the trust to pay the annuity of 250*l.* to Leonard Unett Walker had failed or determined by reason of his bankruptcy in the lifetime of the testator.

Sir Hugh Lucas Tooth for the plaintiff.

R. Cozens Hardy Horne for the annuitant.

The words of the forfeiture clause in the will are words of futurity, and will only be construed as referring to a past bankruptcy so far as is necessary to carry into effect the testator's intention that the annuity shall not fall into the hands of a third person: see *White* v. *Chitty* (1), *Ancona* v. *Waddell* (2) and *In re Forder.* (3)

The material time is the time when the income is first in the hands of the trustees available for payment to the annuitant—see *In re Forder.* (3) In the present case the bankrupt's discharge became effective before any income was so available, and therefore the forfeiture clause did not take effect.

For this purpose there can be no distinction between an annulment and a discharge. Annulment does not wipe out the bankruptcy for all purposes. If income becomes available for payment before annulment, forfeiture will occur and will not be affected by a subsequent annulment. It follows that the material question in every case is whether income would be payable to a third person, apart from the forfeiture clause, at the date when it was first available for payment. In the present case it would not be.

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(1) (1866) L. R. 1 Eq. 372.
(2) (1878) 10 Ch. D. 157, 162.
(3) [1927] 2 Ch. 291.

If the Court were to declare that the forfeiture had now taken effect, it could not be wiped out by subsequent annulment (although no income has yet become available for payment) and this would be directly contrary to the decision in *In re Forder.* (1)

J. A. Wolfe for the annuitant's eldest child.

The forfeiture clause came into operation immediately on the death of the testator. The annuity would have vested completely in the annuitant but for his then bankruptcy. The gift over in favour of his children therefore took effect. The cases relied on on behalf of the annuitant were all cases of annulment of bankruptcy after which property is revested in the former bankrupt: see Bankruptcy Act, 1914, ss. 26, 29. That does not apply to the discharge of a bankrupt which cannot affect a forfeiture previously incurred: see *In re Evans.* (2)

Roger Turnbull for the infant children of the annuitant.

LUXMOORE L.J. [having stated the facts, proceeded:] On May 5, 1939, the Public Trustee took out the originating summons, which is now before me, for the determination of the question whether upon the true construction of the will of the testator the trust to pay out of the income of the testator's estate the sum of 250*l.* per annum to Leonard Unett Walker during his life until the happening of any of the events therein mentioned has failed or determined by reason of the bankruptcy of Leonard Unett Walker during the lifetime of the testator. The defendants to the originating summons are the said Leonard Unett Walker and his three children. It is admitted that, if there had been no discharge in the bankruptcy, the forfeiture clause would have been effective notwithstanding the words of futurity in which it is couched, and the gift over to the children of Leonard Unett Walker would have taken effect. But it is argued that, as the discharge took effect before any payment in respect of the annuity had been made or could legally have been demanded, the Court in construing the provisions of the forfeiture clause ought to stretch the words so as to confine their operation to the existence of a bankruptcy at the date when the first payment in respect of the annuity was made or could have been demanded legally.

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(1) [1927] 2 Ch. 291.

(2) [1920] 2 Ch. 304.

Reliance was placed, in support of this argument, on a number of cases in which the material bankruptcy, though existing at the date when the gift became operative, had been annulled before any payment in respect of that gift had been made or could be demanded. The earliest of those cases is *White* v. *Chitty*. (1) In that case the material words of the clause of forfeiture were: "Provided always, and I hereby "declare, that if my said sons or grandsons, or any or either of "them, shall respectively be outlawed or declared bankrupt, "or shall assign, charge, or incumber his or their respective "life interest or life interests in the said trust premises respectively, or any part or parts thereof respectively, or shall "do or suffer anything whereby the same or any part thereof "respectively would, through his or their act or default, or "by operation or process of law, or otherwise, if belonging "absolutely to him or them, become vested in or payable to "some other person or persons, then and thenceforth the rents "to which, but for this provision, he or they respectively "would be entitled, shall, during the remainder of his or their "life interests therein respectively, from time to time sink "into and be added to and form part of my general personal "estate." Before the testator's death one of his sons had been adjudicated bankrupt. No creditors' assignee had been appointed, but at the date of the testator's death the bankrupt son had not obtained his discharge. Some four months after the testator's death the bankruptcy was annulled with the consent of the creditors. The question to be determined was whether the forfeiture clause had taken effect or not.

Page Wood V.-C. (afterwards Lord Hatherley), after reading the forfeiture clause, said (1): "Now, these words, certainly, so "far as they go, would compel the Court to hold .... that this "bankruptcy, though having taken place anterior to the date of "the will, is such a bankruptcy as, if it were continuing, would "authorize the Court to declare that a forfeiture had taken place "—although the words of futurity in this case"—that is the case before him—"are rather stronger than those which occurred," in certain cases to which reference had been made in the argument before him. He added: "The testator's attention is clearly "not directed to the declaration of bankruptcy, or to the "period when the declaration may take place; but only to "this—that the property intended for the objects of his "bounty shall not pass to a stranger. He does not wish "that the gift shall be a benefit to be conferred upon creditors, "or upon any one other than the devisee. The true intention "of his will, therefore, requires that the words of futurity "should be stretched so as to include a bankruptcy existing "at the date of his death. In this case, the bankruptcy "which existed at the death of the testator never proceeded "beyond this. There was such an official assignee appointed "as that the estate of Charles Chitty vested in him, but no "creditors' assignee was appointed; nothing more was done; "the official assignee took no proceedings by ejectment or "otherwise to recover possession; and he never was in posses-"sion, for before any rents had accrued, or could possibly "accrue, the bankruptcy was annulled. I quite agree .... that "the annulment of the bankruptcy could not have affected the "rights of the Plaintiffs, if a forfeiture had already occurred. "But the question is, has a forfeiture occurred, when, before "any actual demand made, or possession taken by the official "assignee, before one sixpence had accrued to him, the "bankrupt, by his diligence and activity, obtained an annul-"ment of the bankruptcy, so that at the time when the first "rents accrued, there was no hand but his to receive them? "That involves, to some degree, the question of the effect of "annulment, and of what appears to be the state of the "authorities on the subject."

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(1) L. R. 1 Eq. 372.

(1) L. R. 1 Eq. 375.

LUXMOORE L.J.

1939

WALKER, *In re.* PUBLIC TRUSTEE *v.* WALKER.

After dealing with some of the earlier authorities, Page Wood V.-C. continued (1): "But here the annulment "was made with the consent of the creditors. Then I have "to consider—regard being had to all the authorities—whether "or not this gentleman, having succeeded in getting the "bankruptcy annulled before any part of the property was "acquired under the forfeiture clause, must be regarded as "having forfeited his rights, on the ground that, before the "testator died, this adjudication took place. I think, having "regard to those cases in which the Courts have stretched the "words of testators, by making expressions which sound in "the future apply to the past, in order to effectuate the intent, "and to prevent the fund going into other hands than those of "the objects of his bounty, I am bound to hold that the act of "forfeiture in this instance never occurred, because this "gentleman has always been in possession and receipt of these "rents, nobody else having been in a position to receive "them."

But it has, I think, been made plain by the later cases that, if any payment has been made or could have been demanded between the time when the gift takes effect and the date of the annulment, the fact of the annulment will not prevent the operation of the forfeiture clause. I think it is sufficient to mention *In re Forder.* (2) In that case, under the testator's will (the testator having died in 1910) a beneficiary became entitled on the death of his mother to a share in the income of the residuary estate. He was also entitled under the will in expectancy upon the death of his sister to a further share of the income, and in the event of his becoming the longest liver of his sister and the other beneficiaries, to the entire income and capital of the testator's estate. The will provided that, in the event of any beneficiary becoming bankrupt or assigning, charging or incumbering his or her share, such beneficiary should forfeit such share, which should thereupon devolve as thereinbefore provided in case of his or her death. The mother died on December 14, 1925, leaving the beneficiary, who was then an undischarged bankrupt, and his sister her surviving. The testator's estate comprised a large number of freehold cottages, many of which yielded weekly rents, besides investments in stocks and shares and a sum outstanding on mortgage. It had been the custom of the trustees to state half-yearly accounts of income on May 2 and November 2 in each year. On April 7, 1926—that is four months after the death of the mother—the bankruptcy was annulled. The summons was taken out to determine whether the forfeiture clause had taken effect or not, and when it came before Clauson J. there was evidence that, after deducting outgoings from the gross amount of income received by the trustee during the half-year ending May 2, 1926, there was in the trustee's hands a net balance available for distribution ; but there was no evidence that at any time between the death of the mother and the annulment of the beneficiary's bankruptcy the trustee had in his hands moneys immediately payable. Clauson J. held that the forfeiture clause had not taken effect. The matter went to the Court of Appeal, where further evidence was admitted showing that for a number of years it had been the practice of the trustees after discharging current outgoings to prepare a half-yearly account on May 2 and November 2 in each year of the rents and income received by them and then divide and pay the undistributed balance of income amongst the beneficiaries. During the currency of the half-year their practice had been to make monthly payments of 20*l.* to the mother on account of her ultimate share of the current half-year's income, and one of such payments had been made to her on November 1, 1925, and another on December 1, 1925, immediately preceding her death. In the several months between the date of her death and May 2, 1926, the surviving trustee had at different times paid himself certain moneys on account of his share of income, indicating thereby that there was income then available for the other beneficiaries. It was held, reversing the decision of Clauson J., that, upon the further evidence, it was clear that in the interval between the mother's death and the annulment of the bankruptcy there was in the hands of the trustee actual income of the beneficiary's share, which could be treated as payable to or retained or appropriated for his benefit, and that, although the balance payable on May 2, 1926, to the beneficiaries had not then been ascertained, there was money in the hands of the trustee which would have been payable to the beneficiary's trustee in bankruptcy unless the forfeiture clause operated, and that consequently the annulment was not in time to save the forfeiture, and that, upon the true construction of the forfeiture clause, the forfeiture enured to prevent any portion of the share, whether of income or capital, from passing to the beneficiary who had become bankrupt and to deprive him of all interest as a beneficiary under the will.

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(1) L. R. 1 Eq. 377.

(2) [1927] 2 Ch. 291.

Lord Hanworth, after referring to *White* v. *Chitty* (1), said (2): "The best test whether the clause operates appears "to be stated in *Ancona* v. *Waddell* (3), before Hall V.-C., "where he says that one has not to see whether in fact the "money had been paid over or how the money actually stood, "but the test is whether 'it could be said that there was any "'actual income of the share which could be treated as payable "'to, or retained for or appropriated for the benefit of this "'residuary legatee'."

In the present case there was no annulment of the bankruptcy, there was only a suspension of its discharge until a date after the testator's death; that is, Leonard Unett Walker was a bankrupt at the testator's death and remained a bankrupt until December 15, 1938, when the order for discharge became effective. The question is whether the decisions with regard to annulment apply to the case where, although there has been no annulment, there has been a discharge after the gift to be considered became effective. The effect of an annulment is not the same as that of a discharge; each depends upon the relevant provisions of the Bankruptcy Acts. Annulment is dealt with in s. 29. Sub-s. 1 confers power upon the Court to annul a bankruptcy. Sub-s. 2 provides that: "Where an "adjudication is annulled under this section, all sales and "dispositions of property and payments duly made, and all

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(1) L. R. 1 Eq. 372.

(2) [1927] 2 Ch. 308.

(3) (1878) 10 Ch. D. 157, 162.

LUXMOORE L.J.

1939

WALKER, *In re.* PUBLIC TRUSTEE *v.* WALKER.

"acts theretofore done, by the official receiver, trustee, or "other person acting under their authority, or by the Court, "shall be valid, but the property of the debtor who was "adjudged bankrupt shall vest in such person as the Court "may appoint, or, in default of any such appointment, revert "to the debtor for all his estate or interest therein on such "terms and subject to such conditions, if any, as the Court "may declare by order." So that, where an annulment takes place, in the absence of any express direction to the contrary, there is an immediate revesting in the person whose bankruptcy is annulled of that person's property which remains in the trustee's hands. The provisions with regard to discharge are to be found in s. 26 of the Bankruptcy Act, 1914, as amended by the 1926 Act. This section gives power to the Court to order the discharge of a bankrupt. Sub-s. 9 provides that: "A discharged bankrupt shall, notwithstanding his discharge, "give such assistance as the trustee may require in the realisa- "tion and distribution of such of his property as is vested in "the trustee." Sect. 28 provides what is to be the effect of a discharge. Sub-s. 1 states from what the bankrupt shall not be released. Sub-s. 2 states that: "An order of discharge "shall release the bankrupt from all other debts provable in "bankruptcy." It is to be observed that there is no provision as in the case of annulment for the revesting of any of the bankrupt's property in the bankrupt on his discharge. It is necessary, therefore, to consider what became vested in the trustee in bankruptcy under consideration. Sect. 38 is the section which enumerates the property of the bankrupt which vests in the trustee. I need not refer to it in detail. It is sufficient to state that it includes, under sub-s. 2 (*a*): "All "such property as may belong to or be vested in the bankrupt "at the commencement of the bankruptcy, or may be acquired "by or devolve on him before his discharge." In the present case, therefore, the annuity of 250*l.* given to Leonard Unett Walker, which took effect on the testator's death, although nothing was legally payable in respect of it until the expiration of twelve months after the testator's death, would, but for the forfeiture clause, have vested in the trustee in bankruptcy and would not have revested in Leonard Unett Walker when the discharge became effective. Assuming there had been no forfeiture clause, it is true that, if, before the trustee in bankruptcy had reduced the after acquired property in possession by giving notice of his claim to the executors of the will, Leonard Unett Walker had been able to dispose of his interest therein to a third party, that third party's title would have prevailed against the trustee in bankruptcy; but this result would have been brought about by reason of the express provisions of s. 47 of the Act, which provides, in sub-s. 1, that: "All transactions by a bankrupt with any person "dealing with him bona fide and for value, in respect of "property, whether real or personal, acquired by the bankrupt "after the adjudication, shall, if completed before any inter"vention by the trustee, be valid against the trustee, and any "estate or interest in such property which by virtue of this "Act is vested in the trustee shall determine and pass in such "manner and to such extent as may be required for giving "effect to any such transaction." Apart from this provision, and as between the trustee in bankruptcy and the bankrupt, the vesting of the after-acquired property is complete and cannot be affected by the order for discharge.

If any authority is required for the view which I have expressed, I think it is to be found in *In re Evans* (1), where Lord Sterndale said this: "I may say that the son obtained "his discharge some months after the testator's death, but "the bankruptcy was not annulled, and therefore any property "coming to the bankrupt by a title which accrued before his "discharge would vest in the trustee in bankruptcy." It follows from what I have said that the decisions as to annulment of a bankruptcy are not applicable to the case of a discharge. In the present case the discharge only operated as from December 15, 1938. The trustee in bankruptcy's title, but for the forfeiture clause, would have taken effect as on November 16, 1938, on which date the annuity given to Leonard Unett Walker would, apart from that clause, have vested in him.

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(1) [1920] 2 Ch. 304, 315.

In my judgment, the forfeiture clause operated to prevent the vesting and at the same time transferred the annuity to the children of Leonard Unett Walker. I therefore declare that, on the true construction of the testator's will and in the events that have happened, the annuity of 250*l.* directed to be paid to Leonard Unett Walker during his life until the happening of any of the events therein mentioned has failed and determined by reason of his bankruptcy subsisting at the death of the testator. I have come to this conclusion with some regret, because one cannot help appreciating that it is a hardship on Mr. Leonard Unett Walker that his discharge should have been applied for at so short a time before the testator's death; but I am satisfied that it is impossible for me to put any other construction on the will. The costs of all parties as between solicitor and client must be paid out of the testator's residuary estate.

Solicitors: *Bennett, Welch & Co.*

H. L. L.

In re GUNTHER'S WILL TRUSTS.

ALEXANDER *v.* GUNTHER.

[1938. G. 2689.]

FARWELL J.

1939
May 3, 4, 25;
June 14.

Administration—Will—Residuary estate—Trust for sale and conversion—Power to postpone—Gifts to testator's children—Hotchpot clause—Long interval before final distribution—Valuation of estate—Appropriate date.

A testator, having bequeathed his residuary estate to trustees on trust for sale and conversion with power to postpone sale, directed the moneys to arise therefrom to be divided into moieties to be held respectively on certain trusts for the children of his first marriage and their issue and for the children of his second marriage and their issue. He further directed that in the division of the estate certain sums should be brought into hotchpot:—

Held, (1.) that, there being nothing in the will to indicate that the testator had in mind any date at which the estate should be valued for the purpose of adjusting the rights of the parties inter se, the matter must be considered at large;

(2.) that inasmuch as the rights of the parties might vary according to the date selected and it was desirable that it should not be one dependent on the energies of the executors, the valuation should be made as at the death of the testator.

ADJOURNED SUMMONS.

By his will, dated July 29, 1919, Charles Gunther, the testator, who died on August 30, 1931, bequeathed his residuary estate to his trustees, Helen Gunther, his wife, Sir John Ball, and Kenneth Carlisle, on trust for sale and conversion with power to postpone sale.

By cl. 7: "As to the moneys to arise from such sale and "conversion I direct that my trustees (after paying thereout "or retaining all the costs charges and expenses attendant "or incident thereto and paying my debts funeral and testa-"mentary expenses and the legacies given by me and the "duties on any devises or bequests made free of duties) shall "stand possessed of such moneys and the investments repre-"senting the same (hereinafter called 'my residuary trust "'fund') in trust (subject as hereinafter provided) to divide "the same into two equal moieties of which one moiety is "hereinafter called 'the first moiety' and the other moiety "is hereinafter called 'the second moiety.'"

By cl. 8: "As to the first moiety: (*a*) My trustees "shall hold the same in trust for all or any of my children "or child by my first wife who shall survive me and if more "than one in equal shares. . . . . (*c*) In case the foregoing "trusts concerning this moiety shall fail then subject to such "trusts and to all powers vested in my trustees concerning "the same such moiety shall be added to and form part of the "second moiety."

By cl. 9: "As to the second moiety: (*a*) The income "thereof shall be paid to my said present wife during her life. "(*b*) Subject as aforesaid my trustees shall hold such moiety "in trust for all or any my children or child by my said present "wife who survive me and attain the age of twenty-one "years and if more than one in equal shares. . . . ."

By cl. 10: "In the division of my residuary trust fund "the following shall be brought into hotchpot as between "the said two moieties thereof and charged against the same "respectively: (*a*) There shall be charged against the "first moiety (1.) the aggregate sum of 52,500*l.*, and (2.) the "aggregate amount or value of all gifts or settlements (other "than allowances out of current income) exceeding in amount "or value the sum of 5000*l.* made or agreed to be made by "me after September 2, 1918, to or for any child or remoter "issue of mine by my former marriage. (*b*) There shall be "charged against the second moiety (1.) the aggregate amount "or value of all gifts or settlements exceeding as aforesaid "(other than as aforesaid) made or agreed to be made by me "after the date aforesaid to or for any child or remoter issue "of mine by my present marriage, and (2.) the aggregate "amount or value of all gifts or settlements (other than those "made out of current income) made or agreed to be made "by me after the date aforesaid to or for my said present wife, "but so that in no event shall anything be charged in respect "of the policies settled by my settlement dated January 27, "1910. And in the division of the first moiety as between "the children of my first marriage or the persons taking in "substitution for them respectively the following shall be "brought into hotchpot and charged against the respective "shares in such moiety: (*c*) There shall be charged against "the share of my daughter Edith Julia Alexander or those "taking in substitution for her (1.) the sum of 52,500*l.*, and "(2.) the aggregate amount or value of such of the gifts and "settlements covered by sub-cl. (*a*) aforesaid as are made "or agreed to be made to or for her or any of her issue. "(*d*) There shall be charged against the share of my son Herbert "Robert Paul Gunther or those taking in substitution "for him the aggregate amount or value of such of the gifts "and settlements covered by sub-cl. (*a*) aforesaid as are made "or agreed to be made to or for him or any of his issue. And "in the division of the second moiety as between the children "of my present marriage or the persons taking in substitution "for them respectively the following shall be brought into "hotchpot and charged against the respective shares in such "moiety: (*e*) There shall be charged against the share of "each such child or those taking in substitution for him "or her the aggregate amount or value of such of the gifts and "settlements covered by head (1.) of sub-cl. (*b*) aforesaid "as are made or agreed to be made for such child or any of his "or her issue. And I declare that if any question or difficulty "shall arise in construing or working out the provisions of "this clause the same may be determined by my trustees "and their determination . . . . shall bind all persons "interested."

There survived the testator the plaintiffs, Edith Julia Alexander and Herbert Robert Paul Gunther, children by his first marriage, and the defendants, James Henry Gunther and William John Gunther, children by his second marriage. The estate being large and consisting of investments of various kinds in different countries, the administration was complicated. After the death of the testator the investments included in his residuary estate altered considerably in value, with the result that the value of the estate increased.

On December 17, 1938, no final distribution of capital having been made, this summons was taken out to determine

FARWELL J.

1939

GUNTHER'S WILL TRUSTS, *In re.*

ALEXANDER *v.* GUNTHER.

at what date the estate should be valued for the purpose of adjusting the rights of the parties inter se in the final distribution.

J. M. Gover K.C. and *R. H. Hodge* for the plaintiffs, children of the first marriage. The question is whether *In re Hargreaves. Hargreaves* v. *Hargreaves* (1) applies. It is submitted that it does. The testator intended the actual or notional division of the estate to be at his death or within twelve months thereafter. It is an accident that the value of the estate is now greater than it was at his death. That is the date when the estate should be valued for the present purpose. [They referred to *In re Hart. Hart* v. *Arnold* (2); *In re Poyser. Landon* v. *Poyser* (3); and *In re Craven. Watson* v. *Craven.* (4)] In so far as *In re Forster-Brown. Barry* v. *Forster-Brown* (5) suggested that *In re Hargreaves* (1) should not be followed, Sargant J. was at pains to show that the facts were different and distinguishable. *In re Cooke. Randall* v. *Cooke* (6) was a special case; its striking feature was that the estate consisted of property which, even apart from the Great War, it would have been impossible to value. Younger J. took the view that the only fair method for everyone was to adopt the principle in *In re Poyser.* (3) They relied on *In re Mansel. Smith v. Mansel.* (7)

Lionel Cohen K.C. and *B. F. Mendel* for the defendants, children of the second marriage. Wholly different principles apply when one is dealing with capital and when one is dealing with income. In the latter case an artificial method must be adopted. *In re Hargreaves* (1) is distinguishable, having been decided on its own particular facts, and did not lay down any general principle irrespective of a testator's intention. Until debts have been paid and liabilities of all kinds discharged, there can properly speaking be no residue, and the hotchpot provision cannot operate: *Trethewy* v. *Helyar.* (8) Thus the estate should be valued at the date of distribution. Alternatively, it should be valued at the date of retainer. The income tax cases show that till after that date the income cannot be treated as the residuary legatee's: *Dr. Barnardo's Homes National Incorporated Association* v. *Commissioners for Special Purposes of the Income Tax Acts* (1); *Corbett* v. *Commissioners of Inland Revenue.* (2) After that date the persons interested will be entitled in equity to their shares. The cases relied on by the plaintiffs were distinguishable because they were dealing with income and not with capital at the date of distribution. [They referred to *In re Rees. Rees* v. *George* (3) and *In re Tod. Bradshaw* v. *Turner.* (4)]

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(1) (1902) 86 L. T. 43; (1903) 88 L. T. 100.

(2) (1912) 107 L. T. 757.

(3) [1908] 1 Ch. 828.

(4) [1914] 1 Ch. 358.

(5) [1914] 2 Ch. 584.

(6) [1916] 1 Ch. 480.

(7) [1930] 1 Ch. 352.

(8) (1876) 4 Ch. D. 53.

F. R. Evershed K.C. and *J. W. M. Holmes* for the trustees.

Gover K.C. in reply.

1939. June 14. FARWELL J. [having stated the facts:] The question on the summons which I am now asked to determine is what date should be taken as the date on which the estate of the testator is to be valued for the purpose of adjusting the rights of the parties inter se in the final distribution.

There does not appear to be any reported case in which this question has been decided. It, therefore, falls to me to consider the way in which the matter should be dealt with. A question of this sort must be primarily one of the construction of the particular will in each case; that is to say, the Court must look at the will and see whether there is anything in it which indicates that the testator intended the valuation to be made at any particular time. There may be provisions in the will which, although not expressly stating any particular date, point to a conclusion as to what the testator did intend. But in the present case I am unable to find anything in the will which is sufficient ground for saying that the testator contemplated any particular date. There is nothing in the will which I can say indicates that he had some particular date in his mind. I have, therefore, to

(1) [1921] 2 A. C. 1, 8, 11.
(2) [1938] 1 K. B. 567, 574, 588.
(3) (1881) 17 Ch. D. 701.
(4) [1916] 1 Ch. 567.

consider, as it were, at large, what is the appropriate date. The three dates which have been suggested to me in argument are, first, the death of the testator; secondly, the date of retainer for legacy duty purposes, that is December 31, 1936; and, thirdly, the date of distribution.

It has been said, on behalf of those who desire the last date to be taken, that there is, and can be, no residue, properly speaking, until the liabilities of all kinds have been discharged. Reference has been made to the income tax cases where it has been held that no one residuary legatee is entitled to any income for the purposes of tax on that income, that is to say, the income cannot be treated as the residuary legatee's income, until after the date of retainer. It is said that that indicates that some date other than that of the death is the date which should be taken. In my judgment those considerations do not really assist me, because it is not a question of ascertaining what the residue is, it is a question of fixing the date at which the estate is to be valued or has been valued for the purpose, not of ascertaining what the residue is, but for the purpose of adjusting the rights of the parties in the ultimate distribution in a case of this sort, where there are hotchpot provisions.

The date of retainer is suggested, because, it is said, after that date the residue has been ascertained and the various persons will then, in equity at any rate, be entitled to whatever their shares may be. But, if one is to take any date other than the date of the death, it would seem that the only logical date would be the date of actual distribution.

In this case there has been a long interval between the date of the death of the testator, the date of retainer, and the date of actual distribution. As it happens, the various investments which form part of the testator's estate have very much altered in value, with the consequence that different persons interested in the estate will benefit or suffer according to the date which is selected. There is nothing, I think, in the fact that the beneficiaries' rights or interests may vary according to the date which is taken, which assists me in arriving at a conclusion, except for this consideration.

The fact that the interests of the parties may so vary is some indication that a date should be chosen which is fixed, and not one which is in any way dependent upon the energies of the executors and administrators.

I have been referred to a considerable number of authorities in which this sort of question has arisen with regard to the interim distribution of income, and the amounts to be brought in for that purpose, but in my judgment those cases do not assist me in coming to a conclusion in this matter. This is a question of the date to be taken for the purpose of valuing the capital of the estate. Other considerations may arise when the Court is dealing with income and not with capital. In those circumstances, it seems to me that I have to determine this point without the assistance of any decided case at all. As I have said, it seems curious that there should not be any such reported case; but, so far as the industry of counsel has been able to discover, there is no decision which really covers this point. It may be that in most cases the period between the death and the date of distribution is comparatively short; and, therefore, there is not much difference between the values at the death and at the date of distribution. The difference may be so small as not to make it necessary or desirable that any question should be raised. It may be that that is the reason why the matter does not appear to have been already determined. In this particular case, as I have pointed out, the administration has taken a very long period; and it will make a very substantial difference to the beneficiaries if one date is taken rather than another. The three dates which have been suggested are, the date of the death of the testator, the date of retainer, and the date of distribution. Having regard to the fact that, if a date other than that of the death is taken, it must depend to some extent upon the individual executors, it seems to me desirable, if possible, to take one which is not so dependent. I am not suggesting—I have no reason to suggest—in this particular case that there has been any undue delay in the administration of the estate, which was a large and complicated one, and it may well be that the

FARWELL J.

1939

GUNTHER'S WILL TRUSTS, *In re.* ALEXANDER *v.* GUNTHER.

matter could not have been dealt with and disposed of more quickly. But there may be cases in which the administration is delayed because the executors have not exerted themselves as they might have done, and are dilatory in their duties, with the result that the date for distribution may be postponed and by the postponing of the date some of the beneficiaries may benefit and some may suffer. That is a position which, in my view, is not a desirable one, if it can be avoided. I am unable to see that there is really any question of principle at stake in this case. It is really a matter of convenience. Some date must be taken at which the value of the estate can be ascertained for the purpose of making the proper adjustments in the interests of all parties. Having regard to all the circumstances, I have come to the conclusion that the right date, in this case at any rate, is the death of the testator, and I will make a declaration to that effect.

Solicitors: *G. & A. Cosens; Holmes, Son & Pott.*

F. H. C.

In re BROOKS' SETTLEMENT TRUSTS.

LLOYDS BANK, LIMITED *v.* TILLARD.

FARWELL J.

1939 June 27.

[1939. B. 1946.]

Powers—Marriage settlement—Wife's power of appointment to children—Trust in default of appointment—Voluntary settlement by son of his interest—Power subsequently exercised in his favour—Sum appointed payable to him.

By the terms of a marriage settlement the income of the settled fund was directed to be paid to the wife during her life and subject to that trust the fund was to be held in trust for such of her issue as she might by deed or will appoint; in default of any such appointment the fund was to be held in trust for all her children who being sons should attain the age of twenty-one years or being daughters should attain that age or marry in equal shares. In 1929 one of her children, A. T., executed a voluntary settlement whereby he assigned to trustees "all the "part or share, parts or shares and other interest whether vested "or contingent to which the settlor is now or may hereafter "become entitled whether in default of appointment, or under "any appointment hereafter to be made or on failure of any "such appointment of and in the trust property subject to the "marriage settlement." By an appointment in pursuance of the power executed in 1939, his mother appointed him a sum of 3517*l.* and released her life interest:—

Held, (1.) that the terms of the voluntary settlement were on construction wide enough to embrace all the interests which A. T. might take under the marriage settlement, but (2.) that inasmuch as his mother had not at the date thereof exercised her power in his favour, he was purporting thereby to assign a mere expectancy of something to which he was not then entitled but to which he might thereafter become entitled, and (3.) that accordingly he was entitled to require payment of the sum appointed, and could not be compelled to hand it over to the trustees of the voluntary settlement.

In re Ellenborough. Towry Law v. *Burne* [1903] 1 Ch. 697 and *Lovett* v. *Lovett* [1898] 1 Ch. 82 followed.

ADJOURNED SUMMONS.

By a marriage settlement dated November 14, 1904, made on the occasion of the marriage of John Tillard and Emily Close Brooks (hereinafter called Mrs. Tillard) certain funds were settled and assigned to trustees on trust to pay the whole of the income thereof to her during her life. Subject to that

FARWELL J.

1939

BROOKS' SETTLEMENT TRUSTS, *In re.* LLOYDS BANK, LD. *v.* TILLARD.

trust the trustees were by cl. 7 to " hold the settled fund in "trust for such of the issue of Miss Close Brooks by her now "intended or any other marriage and in such manner and "in all respects as she Miss Close Brooks may by deed or will "appoint." By cl. 8: " In default of or so far as there "may not be any such appointment as aforesaid by Miss "Close Brooks the trustees shall subject as aforesaid hold the "settled fund in trust for all the children or any child of Miss "Close Brooks by her now intended or any other marriage "who being sons shall attain the age of twenty-one years "or being daughters shall attain that age or marry in equal "shares if more than one." The marriage was duly solemnized and there were five children, of whom one was Arthur James Tillard (hereinafter called " the son ").

On May 8, 1929, the son executed a voluntary settlement of which Lloyds Bank, Ld., were the trustees. By cl. 1: "The settlor as settlor hereby assigns unto the bank first all "the part or share, parts or shares and other interest whether "vested or contingent to which the settlor is or may hereafter "become entitled whether in default of appointment or under "any appointment hereafter to be made or on failure of any "such appointment of and in the trust property which is "now or may at any time hereafter become subject to the "wife's settlement . . . . to hold the same unto the bank "subject to the prior interests in and powers affecting the "same . . . . upon the trusts and with and subject to the "powers hereinafter declared and contained concerning the "same." By cl. 3 the first trust was to hold the income "upon protective trusts for the benefit of the settlor during "his life."

On March 15, 1939, Mrs. Tillard executed an appointment in pursuance of the power given to her by the settlement. By cl. 1: " In exercise of the power in that behalf given to "her by the settlement and of every or any other power "enabling her in this behalf the appointor hereby irrevocably "appoints that the following sums shall forthwith be raised "by the trustees of the settlement out of the property now "subject to the trusts of the settlement and that, subject "to the payment thereout of the costs of raising the said sums, "the said sums shall be held in trust for the children of the "appointor as hereinafter stated—namely: for Katherine "Lilian Somerville 2056*l.*; for Arthur James Tillard 3517*l.*; "for Hilda Joyce Margesson 2601*l.*; for Hermione Emily "Margaret Tillard 3462*l.*"

FARWELL J.

1939

BROOKS' SETTLEMENT TRUSTS, *In re.*

LLOYDS BANK, LD. *v.* TILLARD.

By a summons issued on May 12, 1939, Lloyds Bank, Ld., who were now trustees of the marriage settlement as well as the voluntary settlement, asked whether they should pay the son the sum appointed to him under the deed of appointment.

Herbert Hart for the plaintiffs.

Norman C. Armitage for the son. The interest in the sum in question came into existence only on the exercise of the power of appointment. It was quite distinct from any previous interest. There is no estoppel in this case. I rely on *Lovett* v. *Lovett.* (1) The voluntary assignment of a mere expectancy is not binding in equity: *In re Ellenborough. Towry Law* v. *Burne.* (2) The sum appointed was given to the son absolutely. The only question is whether his title was displaced by the voluntary settlement. I submit that it was not and that he is entitled to have the sum paid to him.

Eardley-Wilmot for the son's wife, interested under the voluntary settlement. In the authorities cited the Courts were considering a mere spes successionis where the assignor had no interest in the property. At the date of the voluntary settlement the son had an interest in default of appointment in every part of the trust funds of the marriage settlement. That interest might be increased or destroyed by an exercise of the power of appointment. So far as the authorities go there cannot be an enforceable voluntary assignment of a mere expectancy. But there was here an expectancy coupled with an interest. The voluntary settlement should be construed in accordance with its tenor, and the intention of the settlor was clearly to include the sum now appointed. The words used were wide enough to cover it. Further, the appointment must be read into the marriage settlement and the son thus had an interest in it.

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(1) [1898] 1 Ch. 82.

(2) [1903] 1 Ch. 697.

FARWELL J. [having stated the facts:] When one looks at the voluntary settlement, at first sight the answer would seem to be quite clearly that the trustees' duty was to retain the sum of 3517*l.* as part of the funds which the son had voluntarily settled, and the language of the voluntary settlement would seem to leave no doubt on that score, because the settlor assigned to the bank " all the part or share parts or "shares and other interest whether vested or contingent "to which the settlor is now or may hereafter become entitled "whether in default of appointment or under any appointment "hereafter to be made or on failure of any such appointment "of and in the trust property which is now or may at any time "hereafter become subject to the trusts of the wife's settlement." One would say, looking at the language of the settlement, that it would be difficult to find words more apt to embrace in the voluntary settlement all the interests which the son had then or might thereafter have under the marriage settlement and that accordingly the answer should be that it is the duty of the trustees to retain this as part of the voluntary settlement fund. But, when one considers the legal position in this matter, a different aspect seems to appear. If the matter could be tested simply as one of construction, the answer would appear to be in favour of the trustees of the voluntary settlement; but the question is not one of construction only, and I have to consider whether the attempt to assign that which the son has now become entitled to by virtue of the exercise of the power is enforceable against him.

The legal position in the case of a special power of appointment is not in any doubt at all. Referring to Farwell on Powers, 3rd ed., p. 310, I find this statement of principle, which will be found in exactly the same language in earlier editions of the book, and therefore is not in any way the creation of the editor: " The exercise of a power of appointment "divests (either wholly or partially according to the terms

FARWELL J.

1939

BROOKS' SETTLEMENT TRUSTS, *In re.*
LLOYDS BANK, LD.
v.
TILLARD.

"of the appointment) the estates limited in default of appointment and creates a new estate, and that, too, whether the "property be real or personal." Then there is a reference to a decision in the *Duke of Northumberland* v. *Inland Revenue Commissioners* (1), where this statement was adopted by Hamilton J., as he then was. The effect of this is that in the case of a special power the property is vested in the persons who take in default of appointment, subject, of course, to any prior life interest, but liable to be divested at any time by a valid exercise of the power, and the effect of such an exercise of the power is to defeat wholly or pro tanto the interests which up to then were vested in the persons entitled in default of appointment and to create new estates in those persons in whose favour the appointment had been made. That being so, it is, in my judgment, impossible to say that until an appointment has been made in favour of this son that son had any interest under his mother's settlement other than an interest as one of the people entitled in default of appointment; he had an interest in that; but that interest was liable to be divested, and, if an appointment was made (as in fact it was made) in favour of the son, then to that extent the persons entitled in default were defeated and he was given an interest in the funds which he had never had before and which came into being for the first time when the power was exercised. No doubt it is quite true to say that the appointment has to be read in to the marriage settlement, but, in my judgment, that is not sufficient ground for saying that at the time when this voluntary settlement was made the son had any interest at all in the fund other than his vested interest in default of appointment; for the rest, he had nothing more than a mere expectancy, the hope that at some date his mother might think fit to exercise the power of appointment in his favour; but, until she did so choose, he had nothing other than his interest in default of appointment to which he could point and say: "That is a fund to "which I shall become entitled in future or to which I am "contingently entitled." Apart from this he was not

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(1) [1911] 2 K. B. 343, 354.

FARWELL J.

1939

BROOKS' SETTLEMENT TRUSTS, *In re.* LLOYDS BANK, LD. *v.* TILLARD.

contingently entitled at all; he had no interest whatever in the fund until the appointment had been executed.

If that be the true view, as I believe it to be, the result must be that, whatever the language of the settlement may be, the settlor under the voluntary settlement was purporting to assign to the trustees something to which he might in certain circumstances become entitled in the future, but to which he was not then entitled in any sense at all, and if that be so, then it is plain on the authorities that the son cannot be compelled to hand over or to permit the trustees to retain this sum and that he is himself entitled to call upon them to pay it over to him.

There are two cases to which I have been referred. One of them is a decision of Buckley J. (as he then was) in a case of *In re Ellenborough. Towry Law* v. *Burne.* (1) The headnote in that case is this: "The decision in *Meek* v. *Kettlewell* (2) "that the voluntary assignment of an expectancy, even though "under seal, will not be enforced by a Court of Equity, has "not been overruled by *Kekewich* v. *Manning.* (3)" What Buckley J. said was this (1): "The question is whether "a volunteer can enforce a contract made by deed to dispose "of an expectancy. It cannot be and is not disputed that "if the deed had been for value the trustees could have enforced it. If value be given, it is immaterial what is the form "of assurance by which the disposition is made, or whether "the subject of the disposition is capable of being thereby "disposed of or not. An assignment for value binds the "conscience of the assignor. A Court of Equity as against him "will compel him to do that which ex hypothesi he has not yet "effectually done. Future property, possibilities, and expec"tancies are all assignable in equity for value: *Tailby* v. *Official Receiver* (4). But when the assurance is not for "value, a Court of Equity will not assist a volunteer," the reason for that being, that, since it is merely a voluntary act and not an act for consideration at all, the conscience of the assignor is not affected so as in equity to prevent him from saying: "I am not going to hand over this property to which "now for the first time I have become entitled." Then Buckley J. cites a passage from *Meek* v. *Kettlewell* (1) and points out that that is not overruled by the later decision of the Court of Appeal in *Kekewich* v. *Manning* (2), and that the rule is still binding. If that be the true view, it must follow that this particular interest, which for the first time came into being when the appointment was made, is not caught by the settlement.

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(1) [1903] 1 Ch. 697, 700.

(2) (1842) 1 Hare, 464.

(3) (1851) 1 De G. M. & G. 176.

(4) (1888) 13 App. Cas. 523.

The other case to which I was referred was one before Romer J. (as he then was), *Lovett* v. *Lovett.* (3) There the facts were not dissimilar from those in the case that I am considering. Romer J. seems to me to have decided it principally as a question of construction and partly upon the question of estoppel. So far as it is a decision on pure construction, it cannot help me in this case; but I think that, though the learned judge appears to have based it on construction, it is an authority for saying that the view which I take in this case is the true one. Notwithstanding the fact that the language of this voluntary settlement as a matter of construction is wide enough to comprise this interest, the principle of law which I have stated makes it impossible to enforce the settlement to that extent and prevents the settlor from being compelled by this Court to transfer or permit the trustees to retain this money as part of the funds subject thereto.

I regret to have to come to this conclusion, because I think it is quite plainly contrary to what was intended at the date when the voluntary settlement was executed, but none the less I feel compelled by the principles to which I have referred to hold that the answer to the summons must be that the trustees ought to pay to the defendant the sum in question on the footing that that settlement does not operate as a valid assignment or declaration of trust in respect thereof. I make that declaration accordingly.

Solicitors: *Bird & Bird; Dawson & Co.*

F. H. C.

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(1) 1 Hare, 464.

(2) 1 De G. M. & G. 176.

(3) [1898] 1 Ch. 82.

FARWELL J.

1939

June 29.

In re EAVES.

EAVES *v.* EAVES.

[1938. E. 686.]

Will—Construction—Property to be enjoyed by wife during widowhood—Marriage ceremony—Wife as trustee of estate consenting to disposal of property—Marriage not consummated—Decree of nullity twelve years after ceremony—Widow's right to enjoyment of property.

Under the will of a testator who died in 1919 certain property was held by his widow and his son as trustees upon trust for the widow during her widowhood and subject to her interest for the son absolutely. In 1925 the widow went through a ceremony of marriage and thereupon agreed to the property being handed over to the son. In 1937 a decree of nullity of marriage was pronounced on the ground of the husband's incapacity :—

Held, (1.) that the so-called marriage was treated by the Divorce Court as null and void ab initio, and accordingly, though the parties to it had lived together with the status of married people, the widowhood never determined ; but (2.) that the widow having herself as trustee consented to the property being dealt with as it was, she could not now require it to be restored by the son, who had been in possession of it for many years, during which she took no proceedings in the Divorce Court to establish that her widowhood had not determined.

ADJOURNED SUMMONS.

By his will dated January 8, 1918, the testator, Charles Hobley Eaves, gave his wife, Emily Eaves, the plaintiff, the use during her life or widowhood of a leasehold house in Calthorpe Road, Edgbaston, Birmingham, for the unexpired residue of the term for which he held it. After making certain other bequests he devised the residue of his property to Harold Charles Eaves, the defendant, his son by a previous marriage. He died on December 13, 1919, the plaintiff and the defendant being the executors and trustees of his will. They sold the lease and invested the proceeds of sale in the purchase of War Stock in their joint names, it being agreed that the plaintiff was to be entitled to the income during her life or widowhood. On September 24, 1925, she went through a ceremony of marriage, and, on the footing that her interest

FARWELL J.

1939

EAVES, *In re*. EAVES *v.* EAVES.

in the War Stock then ceased, she agreed to its sale and allowed the defendant to receive the proceeds and use them for his own purposes. The marriage was never consummated, and on May 4, 1937, she obtained a decree nisi declaring it null and void on the ground of the husband's incapacity. On November 15, 1937, the decree absolute was pronounced.

In this action the plaintiff claimed a declaration that she was entitled to a life interest in the proceeds of sale of the War Stock on the ground that her widowhood had continued since the testator's death.

Charles Harman K.C. and *Gerald Upjohn* for the plaintiff. The marriage, having been annulled, is void ab initio. For the purposes of this action it is as if there had been no marriage at all. The plaintiff is entitled to be put back in the same position as if she had never been through the ceremony. The decree of nullity had a retrospective operation, so that it amounted to a declaration that there was no marriage and that the parties had never legally been man and wife: *Inverclyde* v. *Inverclyde* (1); *Newbould* v. *Attorney-General* (2); *Fowke* v. *Fowke*. (3) This is really an ordinary action for money had and received. The payment of the proceeds of sale of the War Stock was made to the defendant under a mistake of fact, since, contrary to what was thought, the plaintiff's interest therein had not in fact determined, the marriage not being valid: *In re Wombwell's Settlement. Clerke* v. *Menzies*. (4) It was thought that the marriage was valid. It being established that there never was a marriage at all, the plaintiff was entitled to her life interest, since she never ceased to be the testator's widow. Further, the amount of the fund is recoverable as being money paid by one trustee to another under a common mistake: *In re Robinson. McLaren* v. *Public Trustee* (5); *Jervis* v. *Wolferstan*. (6) The plaintiff's claim is not barred by the Statute of Limitations, since the time must run from the

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(1) [1931] P. 29, 41.

(2) [1931] P. 75.

(3) [1938] Ch. 774, 779.

(4) [1922] 2 Ch. 298.

(5) [1911] 1 Ch. 502.

(6) (1874) L. R. 18 Eq. 18.

FARWELL J.

1939

EAVES, *In re.* EAVES *v.* EAVES.

decree of nullity. Before then there was no right of action in respect of the mistake.

F. B. Fuller for the defendant. It is a disconcerting prospect if, whenever there is a gift of an interest during widowhood, the trustees cannot distribute the fund on the donee's remarriage until they are satisfied that the marriage is not voidable. The question is whether the plaintiff's interest in this property has determined. The widowhood came to an end when the ceremony of marriage was performed, although it has since been declared null and void. In cases where the condition is against assignment, the interest determines on an assignment, even if immediately afterwards it is revoked: *In re Baker. Baker* v. *Baker.* (1) The mere fact that a marriage is declared null and void ab initio does not make it so for all purposes. It is not null and void ab initio for the purposes of transactions such as this: *Dodworth* v. *Dale.* (2) This decree of nullity cannot reopen transactions which were concluded and completed. A marriage declared null and void on the ground of incapacity differs from a bigamous marriage, since in that case there never could have been a valid marriage. But in this case no third party could during the subsistence of the so-called marriage have said that the plaintiff was not a widow. The plaintiff consented to the payment of the fund to the defendant and cannot now repudiate her consent. The transaction was done and completed: *Rogers* v. *Ingham.* (3) It cannot now be set aside. The act of determining the plaintiff's interest cannot be deprived of its effect ex post facto. The parties having agreed to distribute the property on the ground of knowledge common to both of them and the so-called marriage having subsisted for twelve years, the plaintiff could not claim to have her life interest restored.

Charles Harman K.C. in reply.

FARWELL J. [having stated the facts:] The question of the effect of a decree of nullity of marriage has been considered

(1) [1904] 1 Ch. 157.
(2) [1936] 2 K. B. 503.
(3) (1876) 3 Ch. D. 351.

in several reported cases, and was considered by myself in a recent case, *Fowke* v. *Fowke*. (1) I think there is no doubt that, if two persons go through a ceremony of marriage, and ultimately, at the suit of one of them, the marriage is declared null and void on the ground of the incapacity of the other party, their position is this: As from the time that the marriage is solemnized, those two persons are, to all intents and purposes, man and wife, having the status of married people. No one can be heard to say that they are not married people or challenge the validity of the marriage except one or other of the parties themselves—that is the party aggrieved—who can only do so in properly constituted proceedings in the Divorce Court. But, until that has been successfully done, the parties have and retain the status of married people; they have all the obligations to each other and all the rights against each other which married people have. If no step is taken to have the marriage annulled, then they remain to all intents and purposes persons having the status of married people, and the results which flow from that status must necessarily follow during the whole of that period. But, when the marriage is declared null and void, the case is not the same as that of a marriage which is dissolved by the Divorce Court on other grounds, because in the latter case there has been a true marriage, and, though the relationship of married people ceases when the decree nisi is made absolute, until that date the parties were legally married, and were legally man and wife. Again, as I pointed out in my judgment in *Fowke* v. *Fowke* (2), the position in the case of a marriage declared void for incapacity differs wholly from that in the case of a bigamous marriage where, because there never could be a marriage at all, anybody can give information or take other steps to impeach the marriage.

Having regard to these considerations the question here is: Did the lady cease to be the widow of the testator by reason of the ceremony of marriage which was solemnized? If she did, then there is no doubt that this money ceased to be payable to her, because it was only payable during her

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(1) [1938] Ch. 774.

(2) Ibid. 774, 779.

FARWELL J.

1939

EAVES, *In re.* EAVES *v.* EAVES.

widowhood. It is said on behalf of the defendant that her widowhood came to an end when this ceremony was performed, although the marriage has since been declared null and void. I am not able to accept that view. It seems to me that, if the so-called marriage is treated by the Divorce Court as having been null and void, that means null and void ab initio, and therefore, although these two people, the so-called husband and wife, for many years lived together and had all the status of married people, in truth and in fact the widowhood never determined, because the lady never became in law the wife of the second husband.

But that is not, in my view, the conclusion of this matter, because, although the lady did not in fact cease to be the testator's widow, she may yet have ceased to be entitled to this fund, having regard to all the circumstances.

The position is this: These two people, the plaintiff and the defendant, had this War Stock in their joint names. They were both under the belief that the lady was about to enter into a second marriage which would have the effect of putting an end to her widowhood, and they thereupon agreed that this fund, in which up to that time she had had a life interest, should be handed over to the defendant, who was the only other person having an interest in it. That was an arrangement which was entered into by the two parties perfectly lawfully, and by mutual agreement that position was accepted. The lady went through the ceremony of marriage with a man with whom for many years she lived ostensibly as his wife, and she was to all intents and purposes his wife until the decree absolute was made. During the whole of that period she took no steps to have her marriage annulled, but continued to permit the defendant to remain in possession of the fund, making no attempt to claim it in any way. She must have known the facts with regard to her so-called marriage, but, notwithstanding that, she chose to leave things as they were until ultimately she elected to take the necessary steps in the Divorce Court.

In those circumstances, can the lady now say that her widowhood had not ceased and that the arrangement under which the fund passed into the hands of the defendant can be treated as one which she is now entitled to disregard? She says that there was a mistake of fact, and that this is a case of money had and received, and that the Statute of Limitations does not apply, because her right of action did not arise until the decree absolute was made.

In my judgment, having regard to the particular circumstances of this case, it is impossible for her to succeed in this action. She acquiesced in the fund being handed over to her co-trustee. There is now no longer any fund in existence; it has gone to the knowledge and with the consent of this lady. She took no steps throughout all the years which have elapsed since the ceremony of marriage was solemnized until quite recently to have her marriage annulled, or to interfere in any way with the position to which she herself had been a party, and in my judgment it is not right, after all this time, that she should now make this claim against the defendant, who long since has disposed of the money for his own purposes in complete innocence and in the perfectly clear belief that he was entitled to it, since she had acquiesced in his receiving it. He had no means of ascertaining what the position was as between the so-called husband and wife. He was bound to treat the matter on the footing that they were husband and wife, and as such he was entitled to assume, and to act on the assumption, that the lady's widowhood had ceased and that the consequences which resulted from that followed.

In my judgment it would be most inequitable now to hold that the defendant is bound to recoup this money which, as I have said, he has received and has dealt with, in those circumstances. Had there been a trust fund in his hands which was still available, it may be that the plaintiff could have claimed that at any rate as from the decree absolute she was entitled to the interest on that fund. Again, if she had not been herself a trustee, the position might have been different. But having herself, as trustee, consented and agreed to this fund being dealt with as it was, in my judgment, it is not now open to her to come to the Court and say: "I "require the defendant to replace this fund, which I myself "permitted him to receive, and of which he has been in "possession all these years, notwithstanding that I might "long before now, by taking the necessary proceedings in the "Divorce Court, have established some claim to recover it."

In all the circumstances, I am not prepared to make any order against the defendant, and the action must be dismissed with costs.

Solicitors: *Gisborne & Co.; Ward, Bowie & Co., for Lane Clutterbuck & Co., Birmingham.*

F. H. C.

BATCHELAR *v.* EVANS.

FARWELL J.

1939
June 30;
July 4.

[1937. B. 2716.]

Administration—Mortgage debt of deceased—Action against executors—No defence—Judgment—Administration action by beneficiaries—Receiver appointed—Writ of fieri facias issued by judgment creditor—Return of nulla bona—Executors not personally liable.

Failure by executors to defend an action for a debt due from the testator is a conclusive admission of sufficient assets, and a return of nulla bona on a writ of fieri facias issued to enforce the judgment raises a presumption of a devastavit by them; but the presumption is rebutted when, between the date of the judgment and the issue of the fieri facias, a receiver has been appointed in an action for the administration of the testator's estate and the executors have handed over the assets to him.

Leonard v. *Simpson* (1835) 2 Bing. N. C. 176 applied.

ACTION.

On July 14, 1930, a sum of 2000*l.* advanced by Mrs. Sarah Bowen, the lender, was charged on certain leasehold property held by Mrs. Lily Davies, the borrower, for a long term of years. The lender died on December 9, 1931, and the borrower on June 8, 1933. In 1936 Hubert Batchelar, the plaintiff, the administrator of the estate of the lender, brought an action in the King's Bench Division against the defendants, Griffith Evans and Thomas Harries, the executors of the will of the borrower, to recover the mortgage debt. No defence was put in, and on April 15, 1936, leave to sign judgment in the ordinary form was given to the plaintiff. On the same day two beneficiaries under the will of the borrower, Miss Lily Sybil Davies and Miss Violet Davies, brought an action against the defendants for administration of the estate in the Chancery Division, and on April 21, 1936, on a motion, Albert Morgan was appointed receiver, and pursuant to the Court's order he was put into possession of all the assets of the estate. On June 24, 1936, it was ordered that the estate should be administered by the Court. In March, 1937, the plaintiff issued a writ of fieri facias to enforce his judgment. In due course the sheriff made a return of nulla bona. On

July 20, 1937, the plaintiff commenced the present action against the defendants, claiming payment of the mortgage debt by them personally. On July 7, 1938, the property subject to the mortgage was sold by virtue of the power of sale thereunder. The amount realized was 900*l.*, and the plaintiff put in a proof in the administration for the balance due.

R. F. Roxburgh K.C. and *J. L. Stone* for the defendants. The law is rightly stated in the Annual Practice, 1939, p. 149: "Where an executor makes default of appearance on defence "and judgment is entered against him, that judgment is an "admission of assets and as such binds his own assets both "real and personal. . . . . Upon judgment in this form, after "a fi. fa. and return of nulla bona testatoris, the plaintiff "may bring a second action for the debt, for such a return is, "in the absence of an answer, proof of a devastavit, and the "defendant is estopped by the first judgment from denying "assets." See also Williams on Executors, 12th ed., p. 1256. Though a return of nulla bona raised a presumption of a devastavit, the moment it is shown where some of the assets are, that presumption falls to the ground and it becomes a matter of evidence. Here the administration order rebuts the presumption. It is not even necessary to show that the assets have in fact been handed over to the receiver. It is enough to show that the Court has ordered them to be handed over, since the sheriff could not take in execution assets in the hands of the executors bound by an order of the Court. The material date is the date of the Court's order to hand over the assets, since every one was bound by it. Once the Court has intervened to take over the assets, the presumption of a devastavit falls to the ground. In fact in this case all the assets were handed over to the receiver before the return of nulla bona. Further, though the defendants admitted that they had sufficient assets to pay the debt, the plaintiff has taken away part of those assets by selling the mortgaged property. He is accordingly estopped from pressing this claim. It has been held that the presumption of a devastavit in such a case as this is rebuttable by showing that the alteration in the situation between the date of the judgment and the return of nulla bona is not due to a devastavit: *Leonard* v. *Simpson.* (1) [They referred to *In re Womersley. Etheridge* v. *Womersley* (2); *Terrewest* v. *Featherby* (3); *Kent* v. *Pickering* (4); and *Ratcliffe* v. *Winch.* (5)]

G. P. Slade K.C. and *E. M. Winterbotham* for the plaintiff. The only authority having any bearing on this case is *In re Timms* (6), where Bacon V.-C. refused to stay proceedings against executors personally after an administration order had been made. The question is whether the defendants can resist this claim on the sole ground that the administration order was made between the original judgment and the fieri facias. There was an admission of assets by them, and on the return of nulla bona the Court must assume that there has been a devastavit. One must look, not at the Court's order in the administration proceedings, but at the fact that the executors have parted with the assets. The mere making of an administration order is not conclusive in their favour, for there are many grounds on which it might be made, e.g., constant misapplication of the assets by executors. In such a case as that it would be surprising if executors could make a good defence by pleading that the goods were not there when the sheriff came to look for them because they had been handed over to a receiver under the Court's order in an administration action founded on their own misapplication of the funds. If they could show positively that the administration order was founded on circumstances outside their control they might discharge the onus of proving that they had not committed a devastavit. [They referred to *In re Marvin. Crawter* v. *Marvin.* (7)] Further, the plaintiff is not estopped from pursuing this claim because he has taken steps to exercise his rights as mortgagee. He had an inherent right to realize his security. The defendants should have taken realization by him into account in reckoning whether they had sufficient assets.

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(1) 2 Bing. N. C. 176.

(2) (1885) 29 Ch. D. 557.

(3) (1817) 2 Mer. 480.

(4) (1832) 5 Sim. 569.

(5) (1853) 16 Beav. 576.

(6) (1878) 47 L. J. (Ch.) 831.

(7) [1905] 2 Ch. 490.

FARWELL J. [having stated the facts :] The position, as I understand it, in such a case is this : There is no doubt that the King's Bench judgment is conclusive against the defendants as an admission of assets, and the return of nulla bona by the sheriff raises a presumption that a devastavit has been committed by the defendants.

The matter was dealt with by Tindal C.J. in the case of *Leonard* v. *Simpson.* (1) The way he put it was this : " The " short point in this case is, whether such evidence of a "devastavit was given at the trial on the part of the plaintiff, "as, being unanswered by the defendant, entitles the plaintiff "to a verdict ; and we think the evidence was sufficient for "that purpose." Pausing there for a moment, it is quite plain from that statement alone that there must be evidence of devastavit before the plaintiff can get a personal judgment against the defendant, because the whole point in that case was whether there was such evidence. The Court came to the conclusion that there was, the evidence being the return by the sheriff of nulla bona.

Then the Chief Justice goes on : "The judgment by default "in the former action is conclusive upon the defendant, that he "has assets to satisfy the judgment." Pausing there again, it is quite plain that the Chief Justice thought a judgment by default in such a case was a conclusive admission by the defendant that he had assets to satisfy the judgment, and that, I think, is in accordance with the contention put forward by Mr. Winterbotham as to the effect of such a judgment.

The Chief Justice continues : "This is so thoroughly settled "in the case of *Rock* v. *Leighton* (2), and in other cases which "had preceded it, that it was admitted to be the law by the "defendant's counsel in arguing the case of *Erving* v. *Peters.* (3) "The fact therefore is conclusively established against the "defendant, that he has assets of the testator in his hands :

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(1) 2 Bing. N. C. 176, 179.

(2) (1700) 1 Salk. 310.

(3) (1790) 3 T. R. 685.

FARWELL J.

1939

BATCHELAR v. EVANS.

"and the only question which remains is, what evidence is "necessary to shew that he has wasted those assets." Again I stress that evidence is necessary to go the next step and show there has been a devastavit.

Then the Chief Justice proceeds: "In reason and good sense, "very little evidence ought to be necessary for that purpose. "It is his duty when called upon by notice, or by a writ of "execution, either to satisfy the debt out of the monies of the "testator, or to shew the assets to the sheriff, that he may "make the debt out of them; and accordingly, very slender "evidence has at all times been held to be sufficient to prove "the devastavit. The issuing of a writ of fi. fa. directed to the "sheriff of the county where the action was laid, and a return "nulla bona thereto, has, for a long time past, been deemed "evidence enough. And yet, if the reason of the thing be "considered, the suing out and return of such writ into the "county where the action is laid, affords no necessary "presumption that the defendant has ever heard of it." It is plain that in the Chief Justice's view the presumption arising from the return of nulla bona was, like every other presumption, rebuttable.

Then he goes on: "For it is a mere fiction of law to suppose "the defendant resident in the county where the venue is laid "in a personal action: and even if he be, the sheriff would as "a matter of course, return nulla bona to the writ, unless "authentic information was given to him where the testator's "goods were to be found, and they were exposed to his officers. "And before the present practice prevailed, of issuing a fi. fa. "and returning nulla bona thereto, it was usual for the sheriff "to summon an inquest of office, and to return a devastavit "in addition to his return to the writ of fi. fa. which being "an ex parte proceeding, gives no notice whatever to the "defendant." It appears that originally the sheriff summoned an inquest of which, I suppose, notice was given to the defendant, and returned a devastavit if he was so satisfied and if the defendant had not put in any sufficient answer at that inquest.

Then the Chief Justice continues: "In the present case, the "plaintiff sued out a testatum fi. fa. to the sheriff of Litchfield, "with a return that the sheriff had caused to be levied the "costs de bonis propriis of the defendant, and that the "defendant had no goods or chattels of the testator in his "hands to be administered. Now it must be admitted, that "the testatum fieri facias in this case was irregular, inasmuch "as it proceeds upon the suggestion of an award of a writ of "fieri facias to the sheriff of London; whereas the court must "take judicial notice that there are two sheriffs and not one "only. But the testatum fi. fa. is irregular only, it is not a "nullity. And if the plaintiff had applied to amend the "recital, no doubt such amendment would have been permitted "and no objection could have been then taken to the fi. fa. "But the question is, as the testatum fi. fa. has been actually "issued, and returned, and no objection taken against its "irregularity, whether such return, that the sheriff has actually "levied the amount of the costs, out of the proper goods of the "defendant, and that there are no goods of the testator within "his bailiwick, does not afford more satisfactory evidence that "the defendant had notice of the claim, so as to call upon him "to pay the debt or offer the goods of the testator to the sheriff, "than if a fi. fa. had been returned in the ordinary course, "nulla bona, by the sheriff of the county where the action was "brought? And we feel no doubt that such is the case; and "that the defendant was called upon at the trial after the "production of the testatum fi. fa. and return, to shew, that he "had not wasted the goods of the testator, but was ready to "give them to the sheriff, so that it was the sheriff's fault that "he did not make the debt out of them; and as no "such evidence was offered by the defendant at the trial, "we think the plaintiff's evidence sufficient to establish a "devastavit."

In my judgment, it is clear from that case that in the Chief Justice's view the presumption that arises from the fact of the sheriff's return of nulla bona is not conclusive against the defendants, but that it is open to them, if they can, to show why there had been this alteration in the situation between the date of the judgment, when they admitted assets, and the date of the return of nulla bona, and to establish that it is not due to any devastavit committed by them.

In the present case the defendants have shown conclusively that after the judgment and long before the writ of fieri facias the Court had made an administration order and appointed a receiver, and that the receiver had been directed to get in the assets of the deceased debtor. That, it seems to me, affords a complete rebuttal of the presumption. The defendants were not entitled to disobey the order of the Court; they were bound to hand over the assets to the receiver. The evidence which has been called has proved, in my judgment, quite conclusively that they did in fact hand over to the receiver the assets, and that the receiver has since that time administered those assets under the direction of the Court. Indeed that position has been recognized by the plaintiff himself, who in the administration action has sold the mortgaged property under his power of sale. The property realized 900*l.* and he has put in a proof in the administration for the balance due to him, but notwithstanding that he seeks in this action to obtain an order against the defendants personally.

In my judgment this action must fail, because, although the plaintiff has satisfied the first of the two requirements to obtain judgment in an action of this sort, namely, has proved conclusively that at the date of the King's Bench judgment the defendants had admitted assets in their hands, he has failed to show that the return of nulla bona which the sheriff made was due to a devastavit committed by the defendants. In fact the defendants have shown conclusively, in my judgment, that it was due not to a devastavit but to the fact that the Court of Chancery had intervened and had made itself master of the assets.

I was referred to *In re Timms* (1), which was to some extent relied upon, where Bacon V.-C. had refused to stay proceedings against the executors personally after an administration order had been made. That case differs wholly from this, because there the judgment of the Queen's Bench Division and the return of nulla bona by the sheriff both preceded the administration order, and therefore it was not open to the defendant in that case to show that any intervention of the Court was the cause of there being no assets to be found at the date when the sheriff went into possession. That seems to me to be no authority whatever in this case. The truth of the matter is that this sort of action is somewhat artificial. Executors may quite well let judgment go by default without appreciating in the least the effect of so doing; they may not understand that they are in that way admitting assets and making themselves personally liable. The next step, the return of the sheriff, raises a presumption, but is not in itself evidence of a devastavit, although it may be sufficient if there is no explanation forthcoming by the executors; it is a presumption which the executors may rebut. In my judgment, in this case that presumption has been amply rebutted. The plaintiff has his remedy in the administration action, but he is not entitled to an order against the defendants personally.

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(1) 47 L. J. (Ch.) 831.

Solicitors: *T. D. Jones & Co., for F. N. Powell, Son & Pritchard, Llanelly; R. I. Lewis & Co., for Leslie Williams, Llanelly.*

F. H. C.

CROSSMAN J.

1939
July 6, 19, 20.

In re SMITHERS.

WATTS *v.* SMITHERS.

[1939. S. 1281.]

Will — Construction — " Securities " — Whether stock and shares in companies and Government stocks included—" Money."

By a home-made will a testatrix, after directing payment of her debts, etc., made the following bequests : "To my son B. S. when "my securities have been converted into cash two-thirds of the "proceeds. To my son H. O. S. 500*l.* To my son L. S. the re"mainder of the money." Part of the estate left by the testatrix at her death consisted of Government bonds and stock, and also of certain stock and shares in two companies :—

Held, that there was not sufficient context in the will to justify construing "my securities" as anything other than securities in the strict sense of the term, and the stock and shares in the companies did not pass under the gift of " my securities," but that the Government bonds and stock, being secured on the revenues of the Governments concerned, did pass.

Dictum of Lord Cave in *Singer* v. *Williams* [1921] 1 A. C. 41, 49, followed.

Held, further, that having regard to the fact that the testatrix had made a gift of " the remainder of the money " following upon a direction to pay debts, etc., the word " money " must be construed to mean her residuary personal estate.

ADJOURNED SUMMONS.

By her will dated February 16, 1934, Mrs. Sara S. M. A. Smithers, widow (hereinafter called " the testatrix "), after appointing Lieut.-Col. H. O. Smithers and the plaintiff John S. Watts her executors and directing that all her just debts and funeral and testamentary expenses should be paid as soon as conveniently might be after her death continued as follows : " I give and bequeath unto my son Bernard Smithers "when my securities have been converted into cash, two-thirds "of the proceeds. To my son Harry Otway Smithers 500*l.* "To my son Leonard Smithers the remainder of the money."

The testatrix died on January 19, 1937, and probate of her will was granted on April 15, 1937, to her executors in the principal probate registry. At the date of her death the estate of the testatrix amounted to 2812*l.* 9*s.* 3*d.* Part of this consisted of a sum of 984*l.* 7*s.* 8*d.* made up as follows: (1.) 100*l.* Victory Bonds 4 per cent. (Bearer); (2.) sixteen shares Alexandria Engineering Works (Bearer); (3.) 290*l.*, Lever Brothers, Ld., 7 per cent. cumulative preference stock; (4.) 100*l.* Dominion of Canada 3¼ per cent. registered stock 1950–55; and (5.) 277*l.* 14*s.* 7*d.* New Zealand 3 per cent. inscribed stock, 1952–55.

Various questions of construction arose upon the will of the testatrix, and as a result an originating summons was taken out by the plaintiff J. S. Watts, one of the executors of the will, for the determination (inter alia) of the following questions: (1.) Whether upon the true construction of the said will the expression "my securities" as used therein comprised (*a*) all the stocks and shares belonging to the testatrix at the date of her death, or (*b*) some of and if so which of such stocks and shares, or (*c*) and what other property. (1*a*) Whether . . . . the bequest of "two-thirds "of the proceeds" to the defendant Bernard Smithers was a bequest of two-thirds of the proceeds of conversion of (*a*) the whole estate of the testatrix, or (*b*) the property included in the expression "my securities"; (2.) Whether . . . . the bequest of "the remainder of the money" to the defendant Leonard Smithers comprised (*a*) the whole residuary personal estate of the testatrix not specifically bequeathed, or (*b*) cash in the house and at the bank belonging to the testatrix at the date of her death, or (*c*) the balance of proceeds of sale of the securities mentioned in question 1, or (*d*) any and what other property.

A. H. Ormerod for the summons.

Gerald Upjohn for the first defendant, Harry O. Smithers (one of the executors of the will), claiming to be beneficially interested in the event of an intestacy.

Norman C. Armitage for the second defendant, Bernard Smithers. On the meaning of the word "securities": it is submitted that it includes all investments. Compare *In re Rayner* (1) and Tomlin J.'s remarks in *In re*

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(1) [1904] 1 Ch. 176, 188.

Neville (1), when he refers to what Vaughan Williams L.J. said in *In re Rayner.* (2)

There is no principle of law to prevent the Court from holding that "securities" in this will includes all investments. As to the ordinary meaning of the word "securities," see Lord Cave's remarks in the course of his judgment in *Singer* v. *Williams.* (3)

As to the meaning here of the word "money" in the phrase "the remainder of the money," it means, it is submitted, the remainder of the proceeds of sale.

Hon. Denys B. Buckley for the defendant Leonard Smithers. The phrase used by the testatrix here "the "remainder of the money" must mean, it is submitted, her residuary personal estate: see *In re Mellor* (4) and *In re Emerson* (5), and also compare *In re Shaw.* (6)

R. O. Wilberforce for the defendant Charles O. M. Morris (representing the persons interested on an intestacy). On the meaning of the phrase used in the will, "securities," it is submitted that it means any securities strictly so-called and does not pass government stocks or stock or shares in limited companies. See *In re Hutchinson* (7) and the final passage of the judgment of P. O. Lawrence J., which is relied on. This case can be distinguished from another decision of the same judge on somewhat similar words, namely *In re Scorer.* (8)

CROSSMAN J. I have already decided in this case that the expression in the will "the proceeds" means the proceeds of conversion of what the testatrix has described as "my securities," and there will be a declaration to that effect.

What I have now to determine is what is included in the expression "my securities." In considering this question, I have to bear in mind the words of Vaughan Williams L.J. in *In re Rayner.* (2) The learned judge said this:

(1) [1925] Ch. 44, 53.
(2) [1904] 1 Ch. 176, 188.
(3) [1921] 1 A. C. 41, 49.
(4) [1929] 1 Ch. 446.
(5) [1929] 1 Ch. 128.
(6) [1929] W. N. 246.
(7) (1919) 88 L. J. (Ch.) 352, 356.
(8) (1924) 132 L. T. 529.

"I wish to add—although it is not necessary to do so for the "decision of this case, having regard to the ground upon which "the Court is deciding it—that, in my judgment, the meaning "of a word is relative to the circumstances and occasion and "date on which the word is used ; and that if a judge is entitled "to take into consideration at all the fact that at the date "of the will 'securities' is largely used in a sense other than "a pledge for an advance of money, or in the particular "sense of 'investments in property transferable by the " 'assignment of indicia such as certificates,' it is the duty "of the judge to inform his mind, not only by reference "to dictionaries of good reputation, but also by evidence of "the meaning ordinarily given to such a word amongst those "who deal in such property." The first part of that dictum as to the method of construing an expression such as "my securities" was confirmed and adopted by Tomlin J., as he then was, in the case of *In re Neville* (1), where the learned judge quoted those words of Vaughan Williams L.J. : "The "meaning of a word is relative to the circumstances and "occasion and date on which the word is used." There is no doubt that the word "securities" is very commonly used as a synonym for investments or property dealt with on the Stock Exchange, but the word undoubtedly has a primary meaning and something is needed to displace this primary meaning. I think that the passage which has been read from Lord Cave's speech in the House of Lords in the case of *Singer* v. *Williams* (2) really makes it quite clear how I have to approach the question. Lord Cave there says : "My Lords, "the normal meaning of the word 'securities' is not open to "doubt. The word denotes a debt or claim the payment "of which is in some way secured. The security would "generally consist of a right to resort to some fund or pro- "perty for payment ; but I am not prepared to say that "other forms of security (such as personal guarantee) are "excluded. In each case, however, where the word is used "in its normal sense, some form of secured liability is postulated. "No doubt the meaning of the word may be enlarged

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(1) [1925] Ch. 44, 53.

(2) [1921] 1 A. C. 41, 49.

"by an interpretation clause contained in a statute, as by "the interpretation clauses in the Conveyancing and Law of "Property Act, 1881, the Settled Land Act, 1882, the Trustee "Act, 1893, and the Finance Act, 1916; or the context may "show, as in certain cases relating to the construction of wills, "*In re Rayner* (1); *In re Gent and Eason's Contract* (2), that the "word is used to denote, in addition to securities in the ordinary "sense, other investments such as stocks or shares. But, "in the absence of any such aid to interpretation, I think it "clear that the word 'securities' must be construed in the "sense above defined, and accordingly does not include "shares or stock in a company." Now that statement in Lord Cave's speech was made in reference to quite a different matter; it was made in reference to a question under the Income Tax Acts as to the meaning of "securities," but it is in general terms and refers expressly to cases relating to the construction of wills.

There are two other cases to which I have been referred, which in some ways are of assistance and in others are a little embarrassing. One is the case of *In re Hutchinson. Crispin* v. *Hadden.* (3) In that case P. O. Lawrence J., as he then was, in the year 1919 discussed all the previous cases relating to the meaning of the word "securities" and came to the conclusion that in that case the phrase "securities "for money" was indistinguishable from the word "securities," and that, in the absence of a context, stocks and shares did not pass under a bequest of "my moneys and "securities for money." The learned judge there found that there was no sufficient context to enable stocks and shares to pass under the bequest of "securities for money." In the case of *In re Scorer* (4), to which I have also been referred, the same learned judge in December, 1924, found a sufficient context to enable him to construe "securities" as including stocks and shares, one of the grounds of the decision, or at all events one of the points to which the learned judge expressly referred, being that the testatrix had drawn the will herself; it was a home-made will, and that is the case here.

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(1) [1904] 1 Ch. 176.
(2) [1905] 1 Ch. 386.
(3) 88 L. J. (Ch.) 352.
(4) 132 L. T. 529.

Looking again at the will before me, I have to consider whether I can find a sufficient context to show that the word "securities" ought to be given the wider meaning. If I cannot find sufficient context, whatever view I may take as to the intention of the testatrix—which after all is a matter of guessing—then I have to decide that "my securities" is limited to securities in the strict sense. Mr. Armitage, who has argued the case on behalf of the legatee to whom this bequest is made, contends that there is a context here; but I find it difficult to find any context beyond the fact that the will is a home-made will. The testatrix has made use of a printed document which she has filled up in her own hand-writing. In the printed document the words begin like this: "I hereby revoke all wills by me at any time hereto-"for made. I appoint," and then she writes in the names of her executors. Then come the words in print "to be my e-x-e-c-u-t" and she does not fill that up. Then the printed form goes on "and direct that all my just debts and funeral "and testamentary expenses shall be paid as soon as con-"veniently may be after my decease." That is all in print. Then the print begins a fresh paragraph in capital letters: "I give and bequeath unto," and then the print ends, and she fills in "my son Bernard Smithers when my securities "have been converted into cash, two-thirds of the proceeds." Full stop, capital letter: "To my son Harry Otway Smithers "500*l*. To my son Leonard Smithers the remainder of the "money." That is the whole of the will, and I have to consider and, I was going to say, see whether I can find, but I think I ought not to put it in that way—I have to consider whether there is any such context here as will enable me to say that "my securities" means anything more than debts secured on something. The evidence which I have had brought before me to-day shows that the testatrix had an estate of 2812*l*., of which the sum of 984*l*. 7*s*. 8*d*. consisted of stocks, bonds and shares. Those are set out in an exhibited list which is as follows: "(1.) 100*l*. Victory Bonds 4 per "cent. (Bearer); (2.) sixteen shares Alexandria Engineering "Works (Bearer); (3.) 290*l.*, Lever Brothers, Ld., 7 per "cent. cumulative preference stock; (4.) 100*l.* Dominion of "Canada 3¼ per cent. registered stock 1950–55; and (5.) "277*l.* 14*s.* 7*d.* New Zealand 3 per cent. inscribed stock, 1952–55."

Now as regards those five items, which are the ones that I have to consider, the first, the fourth and the fifth I hold to be "securities" in the strict sense of the term, because they are all Government debts secured, I think, by the Government revenues. I hold, therefore, that two-thirds of the proceeds of conversion of those three items passed under the bequest of "two-thirds of the proceeds," because I have already held that "proceeds" means the proceeds of conversion of whatever is included in the term "my securities." The only question is as regards the second and third items, namely the sixteen shares in the Alexandria Engineering Works and the 290*l.* Lever Brothers, Ld., 7 per cent. cumulative preference stock, and those are not "securities," unless I can find sufficient context to construe "securities" as including stocks and shares. I have looked at this will very carefully and I am unable to find sufficient context to justify me in construing "my securities" as meaning anything other than "securities" in the strict sense of the term.

I must therefore hold that two-thirds of the second and third items in this list do not pass to Bernard Smithers under the bequest of "two-thirds of the proceeds."

A further question which I now have to determine is as to the meaning of the words "To my son Leonard Smithers "the remainder of the money." The important thing to notice is that the testatrix directs—it happens to be in the printed part of the will, but I do not think that on that account I can lay any less stress upon it—"that all my just debts "and funeral and testamentary expenses shall be paid as soon "as conveniently may be after my decease," and then: "I give "and bequeath to my son Bernard Smithers when my securities "have been converted into cash, two-thirds of the proceeds. "To my son Harry Otway Smithers 500*l.* To my son Leonard "Smithers the remainder of the money."

CROSSMAN J.

1939

SMITHERS, *In re.* WATTS *v.* SMITHERS.

Mr. Buckley says that "the remainder of the money" there means the residuary personal estate, and he bases his contention upon the fact that you have previously had a direction that all her just debts and funeral and testamentary expenses shall be paid as soon as conveniently may be after her decease. He argues that "the remainder of the money" must be the remainder after taking something out, and that what is to be taken out are the just debts and funeral and testamentary expenses, and I suppose the legacy of 500*l.* to the son Harry Otway Smithers, and that, as those are to be taken out of the residuary personal estate as a whole, "the remainder of the money" must be construed to mean the remainder of the residuary personal estate. Mr. Armitage, on the other hand, says that there is a previous reference to the proceeds of sale of what the testatrix calls "my "securities," which are disposed of, and that the natural meaning of the words "the remainder of the money" would be the remainder of those proceeds of sale. Mr. Buckley, in support of his argument, relied upon the cases of *In re Mellor* (1), and *In re Emerson* (2), and he also referred to the case of *In re Shaw* (3), a decision of Farwell J. I think those cases go to show that, where you have a gift of the remainder of the testator's money, following upon a direction to pay debts, etc., the words "the money" ought to be, and in fact I think must be, construed as meaning the personal estate of the testator or testatrix.

The only question in this case is whether Mr. Armitage's point overrides that, his point being that the words "the money" here naturally mean the proceeds of sale referred to above. I find a difficulty in arriving at that conclusion, tempting though it is, because I think I must note the fact that the testatrix has used the expression "the proceeds" above, and she has given "two-thirds of the proceeds," and I think I should reasonably expect that two lines below she would have referred to it by the same term and would have said: "To my son Leonard Smithers the remainder of the

(1) [1929] 1 Ch. 446.

(2) [1929] 1 Ch. 128.

(3) [1929] W. N. 246.

CROSSMAN J.

1939

SMITHERS, *In re.* WATTS *v.* SMITHERS.

"proceeds"; but instead of that she has said: "To my "son Leonard Smithers the remainder of the money." I think that I must treat the gift here of "the remainder "of the money" as a gift of the remainder of her property after paying her just debts and funeral and testamentary expenses and deducting the property described as the securities, and paying the 500*l.* to the son; that is to say, as the remainder of her residuary personal estate. I hold, therefore, that this gift "to my son Leonard Smithers the "remainder of the money" is a gift to him of the residuary personal estate.

Solicitors: *Coward, Chance & Co.; Bennett, Ferris & Bennett; Walker, Martineau & Co.; Montagu's & Cox & Cardale, for Snell & Co., Tunbridge Wells.*

A. R. LL.-T.

END OF VOL. AND OF CHANCERY SERIES FOR 1939.

BIBL. LONDIN. UNIV.

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In the First Series,
[1939] Ch.

In the Second Series,
[1939] 1 K. B. [1939] 2 K. B. [1939] P.

In the Third Series,
[1939] A. C.

INDEX.

ABYSSINIA—Claim by de jure sovereign to fund claimed by foreign sovereign—Foreign sovereign recognized only as de facto sovereign—Valid claim—Subsequent recognition of foreign sovereign as de jure sovereign—Reversal of previous decision - **182**
See International Law.

ACCOUNTANT—Appointment as trustee in bankruptcy — Member of firm which had acted for the debtor—Accounting party—Valid objection to appointment - - - **761**
See Bankruptcy **8.**

ACTION—Infringement of patent—Pleadings—Defence struck out before trial—Certificate that validity of claim in specification in question refused **724**
See Patent.

—— Proceedings for recovery of arrears of tithe rentcharge—Right of action vested in Tithe Redemption Commission—Time limit for recovery of arrears—Notice—Suspension period
See Tithe Rentcharge. **1.** **155**

ADMINISTRATION — Annuity — Direction to appropriate fund—Gift over of fund subject to annuity—Estate insufficient — Annuitant to receive actuarial value of annuity abated so far as necessary - - **573**
See Will **4.**

—— Bequest of legacy free of duty — Duty referable to English duty only **528**
See Will **5.**

—— *Leasehold estate—Repairing covenants—Indemnity of executors against liability—Indemnity fund paid into Court—Liability statute-barred—Payment out to beneficiaries.*
In re Lewis. Jennings *v.* Hemsley
Simonds J. 232

ADMINISTRATION—*continued.*

2. —— *Mortgage debt of deceased—Action against executors—No defence—Judgment—Administration action by beneficiaries — Receiver appointed—Writ of fieri facias issued by judgment creditor—Return of nulla bona—Executors not personally liable.*
Leonard v. *Simpson* (1835) 2 Bing. N. C. 176 applied. Batchelar *v.* Evans
Farwell J. 1007

3. —— *Payment of death duties and testamentary and administration expenses—Order of application of assets—" Property " undisposed of by will "—Lapsed shares of residue—Direction to pay all death duties out of estate—Statutory order not varied by will—Administration of Estates Act,* 1925 (15 *Geo.* 5, *c.* 23), *s.* 34, *sub-s.* 3 ; *Sch. I., Part II.*
In re Lamb [1929] 1 Ch. 722 followed.
In re Kempthorne [1930] 1 Ch. 268 and *In re Tong* [1930] 2 Ch. 400 ; [1931] 1 Ch. 202 distinguished. *In re* Sanger (Deceased). Taylor *v.* North - - **Simonds J. 238**

4. —— *Tenant for life and remainderman — Wasting property — Leaseholds — No trust for sale and conversion in will—Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *s.* 28, *sub-s.* 2 ; *s.* 35.
Rule in *Howe* v. *Earl of Dartmouth* (1802) 7 Ves. 137 not applicable.
In re Brooker. Brooker v. *Brooker* [1926] W. N. 93 followed. *In re* Berton. Vandyk *v.* Berton - - - **Clauson L.J. 200**

5. —— *Will—Residuary estate—Trust for sale and conversion—Power to postpone—Gifts to testator's children—Hotchpot clause—Long interval before final distribution—Valuation of estate—Appropriate date.*
In re Gunther's Will Trusts. Alexander *v.* Gunther - **Farwell J. 985**

ADOPTION—Legacy upon conditions—Condition of adoption of child — Petition for adoption refused—Failure of condition—Trust created for maintenance of child - - **700**
See Will **6**.

ADVANCEMENT—Bequest of shares of residue for children—Advancements to children by testator—Settlement of advancements—Hotchpot clause —Rule for ascertaining capital and income to be brought into hotchpot
See Will **17**. **705**

AGENT—Required to find house for principal —Purchase by agent of house in name of his nominee—Purported repurchase by himself at higher price—Principal informed of purported purchase only—Resale to principal at yet higher price — Liability to account - - **766**
See Principal and Agent.

AGGREGATION — Estate duty — Settled property — Accumulations fund — Fund passing on death of settlor
See Revenue **2**. **343**

AGRICULTURAL HOLDING—Lease of land —Clause enabling landlord to resume possession of part of land without notice — No compensation payable to tenant — Rent proportionately reduced — Validity of clause - - - - - **382**
See Landlord and Tenant **1**.

AGRICULTURAL LAND—Settled Estates— Tithe rentcharge — Redemption annuity—Tenant for life and remainderman — Annual payments to be borne by tenant for life **77**
See Tithe Rentcharge **2**.

AIR RAID PRECAUTIONS—Scheme for deep shelter disapproved by Ministry —Grant by Metropolitan Borough Council of building lease of part of clearance area—Lessee to construct underground shelter and let to the council—Validity - - - **892**
See Local Government **1**.

ANNUITY—Bequest by will—Forfeiture on alienation or bankruptcy — Annuitant adjudged bankrupt in testator's lifetime — Discharge suspended till after testator's death —Forfeiture effective - - **974**
See Will **1**.

—— Bequest " free of all duties " and " free " of all deductions "—Payable free of income tax - - **654**
See Will **2**.

ANNUITY—*continued.*

—— Direction to appropriate fund—Gift over of fund subject to annuity— Estate insufficient—Annuitant to receive actuarial value of annuity abated so far as necessary - **573**
See Will **4**.

—— Legacies—Settlement of capital required to produce annuities—Estate insufficient to pay legacies and provide settled capital — Capital treated as settled legacies and abated with the legacies - **794**
See Will **3**.

—— Life annuity bequeathed by will of husband domiciled in Northern Ireland—No English investments at date of testator's death—Purchase of English investments before death of annuitant—Liability for English estate duty on death of annuitant
See Revenue **4**. **131**

—— Payable " free of income tax at current " rate for the time being deductible " at source " — Annuitant not entitled to retain income tax recovered - - - - **969**
See Will **12**.

—— Payable out of income of residuary estate—Power to resort to capital— Income insufficient—Intention that capital should be resorted to **934**
See Will **11**.

—— Payable out of residue — Settlement of residue under residuary legatee's will—Tenant for life and remainderman—Capital and income—Incidence of annuity - - **905**
See Will **10**.

—— *Weekly sums—Deed of family arrangement — Construction — Trust of balance of income during continuance of one annuity— Annuities not a continuing charge on income— Principles of construction applicable —Whether trustees should distribute surplus income without regard to possible deficiency in a future year.*
Stelfox v. *Sugden* (1859) Johnson, 234 followed. *In re* Coller's Deed Trusts. Coller *v.* Coller - - - **C. A. 277**

—— Will—Annuitants entitled to a clear yearly sum after deduction of income tax—Relief which annuitants might recover—Returnable to the estate - - - - **750**
See Income Tax.

—— —— Direction to accumulate surplus income—Gift of accumulations at death of annuitant—End of period of accumulation in lifetime of annuitant—Destination of income of accumulations - - - **205**
See Will **16**.

APPEAL—Notice to registrar—Time for giving—"Forthwith" - - **694**
See BANKRUPTCY **1.**

—— Time for appealing expired—Mistake as to effect of rule—Discretion of Court to grant leave to appeal **841**
See PRACTICE **1.**

ARTICLES OF ASSOCIATION—Construction—Share certificate—Right of shareholder to obtain subdivision of shares included in a single certificate
See COMPANY **2.** **373**

—— Rotation and retirement of directors—Construction - - - - **719**
See COMPANY **3.**

ASSIGNMENT—Deed of Assignment for benefit of creditors—Implied assent of certain creditors—Petition by them for receiving order—No right to rely on deed as act of bankruptcy
See BANKRUPTCY **5.** **145**

BANK DEPOSIT—Delivery of bag by donor in contemplation of death—Gift of bag and contents to donee—Bank deposit account book — Not a document of title—Not subject-matter of valid donatio - **922**
See DONATIO MORTIS CAUSA.

BANKRUPTCY — *Appeal* — *Notice to registrar* — *Time* — *"Forthwith"* — *Bankruptcy Act*, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 109, *sub-s.* 4; *s.* 147, *sub-s.* 1—*Bankruptcy Rules*, 1915, *rr.* 132, 385, 386.
In re MUSCOVITCH. *Ex parte* MUSCOVITCH **C. A. 694**

2. —— *Bankruptcy notice* — *French judgment registered in England*—*Judgments* (*Extension*) *Act*, 1868 (31 *&* 32 *Vict. c.* 54), *ss.* 3, 4, 6—*Bankruptcy Act*, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 1—*Administration of Justice Act*, 1920 (10 *&* 11 *Geo.* 5, *c.* 81), *s.* 9—*Foreign Judgments* (*Reciprocal Enforcement*) *Act*, 1933 (23 *Geo.* 5, *c.* 13), *s.* 2, *sub-s.* 1; *ss.* 4, 6.
In re A JUDGMENT DEBTOR - **C. A. 601**

—— Bequest of annuity—Forfeiture on bankruptcy—Annuitant adjudicated bankrupt in testator's lifetime—Discharge suspended till after testator's death—Forfeiture effective
See WILL **1.** **974**

3. —— *Debtor resident abroad*—*Service of petition on debtor in a sealed envelope*—*Service not sufficient*—*Petition dismissed by Registrar*—*Exercise of Registrar's discretion*—*Bankruptcy Act*, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 5, *sub-ss.* 1, 3—*Bankruptcy Rules*, 1915, *rr.* 155, 156, 158—*Order* IX., *r.* 2.
In re A DEBTOR [441 of 1938] **C. A. 251**

BANKRUPTCY—*continued.*

4. —— *Deceased insolvent's estate*—*No personal representative*—*Creditors' petition for administration in bankruptcy*—*Jurisdiction of Court*—*Bankruptcy Act*, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 130, *sub-s.* 2—*Bankruptcy Rules*, 1915, *r.* 303.
In re A DEBTOR - - **Morton J. 594**

5. —— *Deed of assignment by debtor* — *Alleged act of bankruptcy*—*Implied assent of creditor to deed*—*Petition by that creditor*—*Receiving order*—*Invalidity of petition and receiving order*—*Bankruptcy Act*, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 5, *sub-s.* 3.
In re A Debtor [1936] Ch. 165 followed.
In re Stray. Ex parte Stray (1867) L. R. 2 Ch. 374, and *In re Brindley. Ex parte Taylor, Sons & Co.* [1906] 1 K. B. 377, principle applied. *In re* A DEBTOR [No. 382 of 1938]. *Ex parte* THE DEBTOR *v.* THE PETITIONING CREDITORS AND THE OFFICIAL RECEIVER - - - - **C. A. 145**

6. —— *Sale of goods*—*Verbal order by buyer's agent*—*Goods delivered*—*Received by buyer's employee*—*Goods retained by buyer*—*No act by buyer in relation to goods*—*Enforceable contract to buy goods*—*Sale of Goods Act*, 1893 (56 *&* 57 *Vict. c.* 71), *s.* 4, *sub-ss.* 1, 3; *s.* 35.
In re A DEBTOR [No. 38 of 1938]
Farwell and Morton JJ. 225

7. —— *Order of discharge subject to suspension*—*Order made without prejudice to order to be made under s.* 51, *sub-s.* 2, *of the Bankruptcy Act*, 1914—*Order made for annual payments out of income for benefit of creditors*—*Subsequent decision that order came to end on date of discharge*—*Application to have application for discharge reheard and the order of discharge reviewed*—*Order for rehearing*—*Order on rehearing making it condition of discharge that bankrupt should make payment out of income till* 10*s. in £ paid*—*Jurisdiction to make these two orders*—*Bankruptcy Act*, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 26, *sub-ss.* 1, 2; *s.* 51, *sub-s.* 2; *s.* 108, *sub-s.* 1.
In re A DEBTOR - - - **C. A. 489**

8. —— *Trustee elected by creditors* — *Accountant*—*Member of firm who had acted for debtor*—*Sums received and payments made on his behalf*—*Proof of debt for professional services*—*Objection of Board of Trade to appointment*—*Bankruptcy Act*, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 19.
In re BEALE (R. G. F.). *Ex parte* THE BOARD OF TRADE - - **Farwell J. 761**

BANKRUPTCY NOTICE—French judgment registered in England—Valid notice
See BANKRUPTCY **2.** **601**

BEQUEST—Gift for relief of infirm, sick and aged Roman Catholic priests—Good charitable bequest - **22**
See CHARITY **2.**

BEQUEST—*continued.*

—— Gift to child of testator contingent on her attaining certain age—Death in lifetime of testator under that age—Lapse - - - - - **780**
See WILL **9.**

—— "Securities"—Whether stocks and shares of companies and government stocks included—"Money"—Residuary personal estate - - **1015**
See WILL **14.**

BUILDING SCHEME—Residential property—Restrictive covenants—No building scheme for benefit of whole estate—Mutual rights of owners of subdivided plot - - - **656**
See COVENANT **2.**

BUILDING SOCIETY—*Mortgage—Advance on security of house coupled with collateral security given by builder—Whether ultra vires—Building Societies Act,* 1874 (37 *&* 38 *Vict. c.* 42), *ss.* 13, 25.
BRADFORD THIRD EQUITABLE BENEFIT BUILDING SOCIETY *v.* BORDERS **Bennett J. 520**

CAPITAL AND INCOME—Annuity made payable out of residuary estate—Settlement by residuary legatee's will—Incidence of annuity - **905**
See WILL **10.**

CAPITAL MONEYS — Settlement — Investments representing proceeds of sale of settled realty — French will operative in England to pass personality only—Will inoperative to pass the investments - - **90**
See WILL **15.**

CARRIAGE WAY—Right of way—Motor vehicles included - - - **861**
See EASEMENT **2.**

CASES :—

—— *Adamson* v. *Attorney-General* [1933] A. C. 257.
Distinguished. *In re* HODSON'S SETTLEMENT - - **C. A. 343**

—— *Allhusen* v. *Whittell* (1867) L. R. 4 Eq. 295.
Distinguished. *In re* DARBY **C. A. 905**

—— *Astor, In re* [1922] 1 Ch. 364.
Followed. *In re* SHARPE'S DEED OF RELEASE - **Morton J. 51**

— *Attorney-General* v. *Dickinson & Baron* [1937] 2 K. B. 574.
Approved. *In re* HODSON'S SETTLEMENT - - **C. A. 343**

—— *Attorney-General* v. *Johnson* [1907] 2 K. B. 885.
Considered. *In re* WHITE **C. A. 131**

CASES—*continued.*

—— *Attorney-General* v. *Lloyds Bank, Ld.* (1934) 151 L. T. 268.
Not followed. *In re* HODSON'S SETTLEMENT - - **C. A. 343**

—— *Attorney-General* v. *Lloyds Bank, Ld.* [1935] A. C. 383, 397.
Applied. *In re* HODSON'S SETTLEMENT - - - - **C. A. 343**

—— *Attorney-General* v. *Watson* [1917] 2 K. B. 427.
Followed. *In re* WHITE **C. A. 131**

—— *Attwood* v. *Gibbons* (unreported).
Followed. DAPONTE *v.* SCHUBERT AND ROY NOMINEES, LD. **Morton J. 958**

—— *Babcock & Wilcox, Ld.* v. *Water Tube Boiler & Engineering Co.* (1910) 27 R. P. C. 626.
Followed. SUPERMA, LD. *v.* TENCONI **Morton J. 724**

—— *Baird* v. *Williamson* (1863) 15 C. B. (N. S.) 376.
Considered. WESTHOUGHTON COAL AND CANNEL COMPANY *v.* WIGAN COAL CORPORATION **Luxmoore L.J. 393**

—— *Ballard's Conveyance, In re* [1937] Ch. 473.
Distingished. MARQUESS OF ZETLAND *v.* DRIVER - **C. A. 1**

—— *Bannatyne* v. *D. & C. MacIver* [1906] 1 K. B. 103.
Distinguished. *In re* CLEADON TRUST, LD. - - **C. A. 286**

—— *Blackwell* v. *Blackwell* [1929] A. C. 318.
Applied. *In re* COOPER **C. A. 811**

—— *Brindley, In re. Taylor, Sons & Co., Ex parte* [1906] 1 K. B. 377.
Applied. *In re* A DEBTOR **C. A. 145**

—— *Brooker, In re. Brooker* v. *Brooker* [1926] W. N. 93.
Followed. *In re* BERTON **Clauson L.J. 200**

—— *Buchanan-Wollaston's Conveyance, In re* [1939] 1 Ch. 217.
Affirmed - - - **C. A. 738**

—— *Clark's Trust, In re* (1875) 1 Ch. D. 497
Distinguished. *In re* FORSTER **Bennett J. 22**

—— *Cleadon Trust, Ld., In re* [1938] Ch. 660.
Affirmed - - - **C. A. 286**

—— *Cooper, In re* [1939] Ch. 580.
Affirmed - - - **C. A. 811**

—— *Cottrell, In re* [1910] 1 Ch. 402.
Distinguished. *In re* DE CHASSIRON - - - **Morton J. 934**

CASES—*continued.*

—— *Cox, In re* [1938] Ch. 556.
Considered. *In re* De Chassiron **Morton J. 934**

—— *Cugny's Will Trusts, In re* [1931] 1 Ch. 305.
Followed. *In re* Thomas **Bennett J. 513**

—— *Daniel, In re* [1917] 2 Ch. 405.
Distinguished. Wallington *v.* Townsend - **Morton J. 588**

—— *D' Auvergne* v. *Cooper* [1899] W. N. 256.
Followed. Daponte *v.* Schubert and Roy Nominees, Ld. **Morton J. 958**

—— *Debtor, In re* [1936] Ch. 165.
Followed. *In re* A Debtor **C. A. 145**

—— *Dennis* v. *Malcolm* [1934] Ch. 244.
Applied. *In re* Cawston's Conveyance - - **Simonds J. 784**

—— *Dillon, In re* (1890) 44 Ch. D. 76.
Distinguished. Delgoffe *v.* Fader **Luxmoore L. J. 922**

—— *Ellenborough, In re* [1903] 1 Ch. 697.
Followed. *In re* Brooks' Settlement Trusts - **Farwell J. 993**

—— *Elliston* v. *Reacher* [1908] 2 Ch. 374, 384.
Considered. Lawrence *v.* South County Freeholds, Ld. **Simonds J. 656**

—— *Esberger* v. *Capital and Counties Bank* [1913] 2 Ch. 366.
Followed. Transport and General Credit Corporation, Ld. *v.* Morgan - - **Simonds J. 531**

—— *Evered, In re* [1910] 2 Ch. 147.
Considered. *In re* Brown's Settlement - **Morton J. 944**

—— *Farmer, In re* [1938] W. N. 411.
Distinguished. *In re* Carew **Simonds J. 794**

—— *Farmer, In re* [1939] Ch. 573.
Distinguished. *In re* De Chassiron **Morton J. 934**

—— *F. W. Woolworth & Co.* v. *Lambert* [1937] Ch. 37.
Considered and distinguished. National Electric Theatres, Ld. *v.* Hudgell - **Morton J. 553**

—— *Goldsmiths' Co.* v. *West Metropolitan Ry. Co.* [1904] 1 K. B. 1.
Considered. Queen Anne's Bounty *v.* Tithe Redemption Commission **Morton J. and C. A. 155**

—— *Hargreaves, In re* (1903) 88 L. T. 100.
Distinguished. *In re* Wills **Simonds J. 705**

—— *Hodson's Settlement, In re* [1938] Ch. 916.
Reversed - - - **C. A. 343**

—— *Hodson's Settlement, In re* [1939] Ch. 343.
Followed. Westminster Bank, Ld. *v.* Att.-Gen. - - **C. A. 610**
Applied. *In re* Payne's Declaration - - - **Simonds J. 865**

—— *Hosack* v. *Robins* [1917] 1 Ch. 142; 332.
Considered. Daponte *v.* Schubert and Roy Nominees, Ld. **Morton J. 958**

—— *Jones, In re* [1933] Ch. 842.
Distinguished. *In re* Maclennan **C. A. 750**

—— *Kempthorne, In re* [1930] 1 Ch. 268.
Distinguished. *In re* Sanger **Simonds J. 238**

—— *King* v. *Dickeson* (1889) 40 Ch. D. 596.
Discussed and distinguished. Lawrence *v.* South County Freeholds, Ld. - - **Simonds J. 656**

—— *Kingcome, In re* [1936] Ch. 566.
Followed. *In re* Eves **Morton J. 969**

—— *Knight* v. *Simmonds* [1896] 1 Ch. 653.
Discussed and distinguished. Lawrence *v.* South County Freeholds, Ld. - **Simonds J. 656**

—— *Lamb, In re* [1929] 1 Ch. 722.
Followed. *In re* Sanger **Simonds J. 238**

—— *Lambert* v. *F. W. Woolworth & Co.* [1938] Ch. 883.
Considered and distinguished. National Electric Theatres, Ld. *v.* Hudgell - **Morton J. 553**

—— *Leigh's Settled Estates, In re* [1926] Ch. 852.
Not followed. *In re* Sharpe's Deed of Release - - **Morton J. 51**

—— *Leigh's Settled Estates* (No. 2), *In re* [1927] 2 Ch. 13.
Not followed. *In re* Sharpe's Deed of Release - **Morton J. 51**

—— *Leonard* v. *Simpson* (1835) 2 Bing. N. C. 176.
Applied. Batchelar *v.* Evans **Farwell J. 1007**

—— *Lord Strathcona* v. *Inland Revenue* 1929 S. C. 800.
Considered. *In re* Payne's Declaration - **Simonds J. 865**

—— *Lovett* v. *Lovett* [1898] 1 Ch. 82.
In re Brooks' Settlement Trusts **Farwell J. 993**

CASES—*continued.*

—— *Mansel, In re* [1930] 1 Ch. 352.
Not followed. *In re* WILLS **Simonds J. 705**

—— *Nicholson, In re* [1938] 3 All E. R. 270.
Distinguished. *In re* FARMER **Farwell J. 573**
Distinguished. *In re* CAREW **Simonds J. 794**

—— *Nicholson, In re* [1938] 3 All E. R. 270.
Considered. *In re* DE CHASSIRON **Morton J. 934**

—— *Nicholson's Settlement, In re* [1930] Ch. 308.
Affirmed - - - **C. A. 11**

—— *Norton, In re* [1929] 1 Ch. 84.
Considered and followed. *In re* SHARPE'S DEED OF RELEASE **Morton J. 51**

—— *Owthwaite, In re* [1891] 3 Ch. 494.
Doubted and distinguished. *In re* WARREN - - **Simonds J. 684**

—— *Parker's Settled Estates, In re* [1928] Ch. 247.
Considered and followed. *In re* SHARPE'S DEED OF RELEASE **Morton J. 51**

—— *Perkins, In re* [1907] 2 Ch. 596.
Distinguished. *In re* DARBY **C. A. 905**

—— *Pettit, In re* [1922] 2 Ch. 765.
Followed. *In re* MACLENNAN **C. A. 750**
Followed. *In re* EVES **Morton J. 969**

—— *Popham, In re* (1914) 111 L. T. 524.
Followed. *In re* DARBY **C. A. 905**

—— *Poyser, In re* [1908] 2 Ch. 128.
Followed and applied. *In re* WILLS **Simonds J. 705**

—— *Poyser, In re* [1910] 2 Ch. 444.
Considered and distinguished. *In re* LEICESTER'S SETTLED ESTATES **Morton J. 77**
Distinguished. *In re* DARBY **C. A. 905**

—— *Pryce, In re* [1917] 1 Ch. 234.
Followed and explained. *In re* KAY'S SETTLEMENT **Simonds J. 329**

—— *Rees, In re* (1881) 17 Ch. D. 701.
Followed and applied. *In re* WILLS **Simonds J. 705**

—— *Ryland, In re* [1903] 1 Ch. 467, 474.
Referred to. *In re* GORHAM'S CHARITY GIFT - **Crossman J. 410**

—— *Scott* v. *Inland Revenue Commissioners* [1935] Ch. 246, 265; [1937] A. C. 174.
Applied. *In re* HODSON'S SETTLEMENT - - - **C. A. 343**

CASES—*continued.*

—— *Shenton* v. *Tyler* [1939] Ch. 271.
Reversed - - - **C. A. 620**

—— *Shrewsbury Estate Acts, In re* [1924] 1 Ch. 35.
Referred to. *In re* COWLISHAW **Bennett J. 654**

—— *Singer* v. *Williams* [1921] 1 A. C. 41, 49.
Followed. *In re* SMITHERS **Crossman J. 1015**

—— *Smith* v. *Kenrick* (1849) 7 C. B. 515.
Considered. WESTHOUGHTON COAL AND CANNEL COMPANY *v.* WIGAN COAL CORPORATION **Luxmoore L.J. 393**

—— *Stelfox* v. *Sugden* (1859) Johnson, 234.
Followed. *In re* COLLER'S DEED TRUSTS - - - **C. A. 277**

—— *Stray, In re. Stray, Ex parte* (1867) L. R. 2 Ch. 374.
Applied. *In re* A DEBTOR **C. A. 145**

—— *Thompson, In re* [1908] W. N. 195.
Distinguished. *In re* DARBY **C. A. 905**

—— *Tong, In re* [1930] 2 Ch. 400; [1931] 1 Ch. 202.
Distinguished. *In re* SANGER **Simonds J. 238**

—— *United States of America* v. *Wagner* (1867) L. R. 2 Ch. 582, 593.
Applied. HAILE SELASSIE *v.* CABLE AND WIRELESS LD. (No. 2) **Bennett J. and C. A. 182**

—— *Vaux, In re. Nicholson* v. *Vaux* [1938] Ch. 581.
Reversed - - - **C. A. 465**

—— *Westhoughton Coal & Cannel Co.* v. *Wigan Coal Corporation, Ld* [1939] 1 Ch. 393.
Affirmed - - - **C. A. 800**

—— *Weston, In re* [1902] 1 Ch. 680.
Distinguished. DELGOFFE *v.* FADER **Luxmoore L.J. 922**

—— *Williames, In re* (1885) 52 L. T. 41; (1886) 54 L. T. 105.
Distinguished. *In re* DARBY **C. A. 905**

—— *Willis, In re* [1911] 2 Ch. 563.
Distinguished. *In re* MCEACHARN'S SETTLEMENT TRUSTS **Bennett J. 858**

CHARGING ORDER — Shares — Foreclosure order refused—Sale - - **908**
See SHARES.

CHARITY—*Will—Devise of residuary real estate for the benefit of the public—Scheme—Order vesting part of land in Official Trustee of Charity Lands—Executors not to assent to devise of another portion without leave of judge—Subsequent order giving leave to assent to devise in favour of Official Trustee of Charity Lands—Desire by trustees of charity to retain*

CHARITY—*continued.*
land unsold for period of years—Jurisdiction of Court to postpone sale—Mortmain and Charitable Uses Act, 1891 (54 & 55 *Vict. c.* 73), *ss.* 5, 6 *and* 8—*Administration of Estates Act,* 1925 (15 *Geo.* 5, *c.* 23), *s.* 36, *sub-s.* 2.
In re Ryland [1903] 1 Ch. 467, 474, referred to. *In re* Gorham's Charity Gift and *In re* The Mortmain and Charitable Uses Act, 1891 - - **Crossman J. 410**

2. —— —— *Gift of income in perpetuity to society for relief of infirm sick and aged priests—Trust for advancement of religion—Good charitable bequest.*
In re Clark's Trust (1875) 1 Ch. D. 497 distinguished. *In re* Forster. Gellatly *v.* Palmer - - - - **Bennett J. 22**

CINEMA—Premises let on long lease—Proposal to demolish and rebuild as shops — "Improvement" — "Reasonable and suitable to "character" of holding - **553**
See Landlord and Tenant **2.**

CLOG—Mortgage by demise—Covenant for repayment in eighty half-yearly instalments—Not a clog on the equity of redemption - - **441**
See Mortgage.

COMPANY — *Advances by director to subsidiary companies for benefit of company—Advances made at request of secretary—Borrowing not authorized by effective resolution of directors.*
Bannatyne v. *D. & C. MacIver* [1906] 1 K. B. 103 distinguished.
Decision of Bennett J. [1938] Ch. 660 affirmed. *In re* Cleadon Trust, Ld.
C. A. 286

2. —— *Articles of association — Share certificate—Right of shareholder to obtain a subdivision of shares included in a single certificate.*
Sharpe *v.* Tophams, Ld. - **C. A. 373**

3. —— —— *Rotation and retirement of directors—Construction.*
In re David Moseley & Sons, Ld.
Simonds J. 719

4. —— *Debenture stock — Redemption — Fixed date—Re-issue—Companies Act,* 1929 (19 & 20 *Geo.* 5, *c.* 23), *s.* 75, *sub-ss.* 1, 2, 3, 5.
In re The Antofagasta (Chili) and Bolivia Railway Co., Ld.'s Trust Deed. The Company *v.* Schröder and Others
Morton J. 732

5. —— *Insurance company carrying on various classes of business—Compulsory liquidation—Assets how distributable—Assurance Companies Act,* 1909 (9 *Edw.* 7, *c.* 49), *ss.* 2, 3, 4, 5.
In re London General Insurance Company, Ld. - - - **Bennett J. 553**

COMPANY—*continued.*
—— Purchase of goods for disposal on hire-purchase agreements—Notes issued charged on the assets—Default in payment—Appointment of receiver—No prior lien for unpaid purchase money—Valid security - **531**
See Contract.

6. —— *Scheme of arrangement with creditors—Proposed transfer of undertaking to new company for realization of assets and distribution—Scheme approved by creditors, but opposed by shareholders—Ultra vires—No jurisdiction to sanction—Companies Act,* 1929 (19 & 20 *Geo.* 5, *c.* 23), *ss.* 153, 154.
In re Oceanic Steam Navigation Co., Ld. - - - - - **Simonds J. 41**

—— Unpaid rates — Petition of Local authority for winding-up - **690**
See Local Authority.

7. —— *Winding-up — Discovery and examination of witness—Order on director of another company to attend for examination and produce debentures and other documents—Whether companys' documents are in possession of one director—Motion to discharge order as premature and oppressive—Discretion of Court—Companies Act,* 1929 (19 & 20 *Geo.* 5, *c.* 23), *s.* 214.
In re Maville Hose, Ld. **Simonds J. 32**

COMPULSORY LIQUIDATION — Insurance company — Various classes of business carried on — Assets how distributable - - - **553**
See Company **5.**

CONDITION—Legacy upon conditions—Condition of adoption of child—Petition for adoption of child refused—Failure of condition—Trust created for maintenance of child - - **700**
See Will **6.**

CONTRACT—Contract thought to be entered into on behalf of firm — Action commenced in firm name—Bona fide mistake — Substitution of plaintiff - - - - **569**
See Practice **3.**

—— *Hire-purchase finance agreement — Trust deed to secure repayment of notes — Notes issued and taken up by group of financial companies—Default in repayment—Appointment of receiver—Action to enforce security—Claim to prior lien for unpaid purchase money of goods—Whether security valid or unenforceable—Moneylenders Act,* 1900 (63 & 64 *Vict. c.* 51), *s.* 6 (*d*)—*Moneylenders Act,* 1927 (17 & 18 *Geo.* 5, *c.* 21), *s.* 17—*Companies Act,* 1929 (19 & 20 *Geo.* 5, *c.* 23), *s.* 266.
Esberger v. *Capital and Counties Bank* [1913] 2 Ch. 366 followed. Transport and General Credit Corporation, Ld. *v.* Morgan - - - - **Simonds J. 531**

CONTRACT—*continued.*

—— Mistake on plan—Parties not ad idem—Damages - - - - **588**
See Vendor and Purchaser.

—— Poor Law officer appointed by public authority under statutory powers—Deduction from pay during illness—Sick pay regulations not disclosed to officer—Not implied term of contract - - - - **771**
See Public Authority.

—— Sale of goods—Verbal order by buyer's agent—Goods delivered—Receipt by buyer's employee—Enforceable contract to buy the goods - **225**
See Bankruptcy **6.**

CONVERSION — Settlement — Investments representing proceeds of sale of settled realty — French will operating in England to pass personalty only—Will inoperative to pass the investments - - **90**
See Will **15.**

CONVEYANCE—Conveyance of land to joint tenants—Deed of covenant by joint tenants restricting user—Refusal of application of one party for sale - - - - **738**
See Covenant **2.**

CORPORATION — *Municipal corporation — Tramway undertaking — Employees' superannuation fund — Voluntary unregistered association—Weekly subscriptions by deduction from wages—Contributions by corporation—Actuarial deficiency in funds—Scheme incidental to statutory powers and intra vires—Fund not for " acquisition of gain "—No contract between members of fund and corporation—Companies Act,* 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 357.
Armour *v.* Liverpool Corporation
Simonds J. 422

COVENANT—*Conveyance of land to joint tenants—Deed of covenant executed by joint tenants—Restrictions on user—Application by one of joint tenants to Court to order sale—Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *ss.* 25, 30, 35, 36.
Decision of Farwell J. [1939] 1 Ch. 217 affirmed. *In re* Buchanan-Wollaston's Conveyance. Curtis *v.* Buchanan-Wollaston - - **Farwell J. 217 and C. A. 738**

—— Covenant by husband not to revoke will — Death of wife — Remarriage of husband—Resulting revocation of will not a breach of covenant **820**
See Deed of Separation.

2. —— *Restrictive covenants — Not to carry on trade or business — Exception of " school or seminary "—School of music—Breach of covenant—Right to enforce—Residential property developed about* 1843—*No building scheme for benefit of whole estate—Mutual rights of owners of subdivided plot.*
Elliston v. *Reacher* [1908] 2 Ch. 374, 384 considered.
Knight v. *Simmonds* [1896] 1 Ch. 653 and *King* v. *Dickeson* (1889) 40 Ch. D. 596 discussed and distinguished. Lawrence *v.* South County Freeholds, Ld.
Simonds J. 656

—— Restrictive covenant for benefit of whole or any part of settled land—Part of land a mile distant—Validity of covenant—Action by vendor's successor in title to restrain breach—Form of injunction - **1**
See Restrictive Covenants.

—— Voluntary settlement — Covenant to settle after-acquired property—Refusal of settlor to implement covenant—Trustees directed not to take proceedings to enforce it - **329**
See Settlement **5.**

DAMAGES—Flooding of mine—Discharge of water through tunnel to pumping pit—Cesser of pumping—Removal of barriers by other parties—Flooding of workings in lower mine not in existence when tunnel made—No liability - - - - **393**
See Mines and Minerals **2.**

DEATH DUTIES—Direction in will to pay out of estate—Lapsed shares of residue—Order of application of assets—Statutory order not varied by will - - - - **238**
See Administration **3.**

DEBENTURE STOCK — Redemption — Fixed date — Re-issue — Same date for redemption required **732**
See Company **4.**

DEBTOR—Deed of assignment for benefit of creditors—Implied assent by some of creditors—Petition by these creditors for receiving order—No right to rely on deed as act of bankruptcy - - - - **145**
See Bankruptcy **5.**

—— Resident abroad — Petition — Service on debtor in sealed envelope—Service insufficient — Registrar's discretion - - - - **251**
See Bankruptcy **3.**

DECREE OF NULLITY — Property bequeathed to wife during widowhood—Remarriage—Decree of nullity after twelve years—Widow's right to enjoyment of property - **1000**
See Will **7.**

DEED OF SEPARATION — *Covenant by husband not to revoke certain provisions in his will—Death of wife—Remarriage of husband—Revocation of will—Construction of covenant—Wills Act*, 1837 (7 *Will.* 4 & 1 *Vict. c.* 26), *ss.* 18, 20.
Decision of Farwell J. affirmed. *In re* MARSLAND. LLOYDS BANK, LD. *v.* MARSLAND - - - - - **C. A. 820**

DELEGATION—Town planning — Land privately owned by club—Resolutions to prepare scheme — Subsequent negotiations with owners of club for town planning the land—Agreement negotiated by subcommittee and ratified by local authority—Valid agreement - **110**
See LOCAL GOVERNMENT **2.**

DIRECTOR—Advances by director of company to subsidiary companies for benefit of company—Advances made at request of secretary—Borrowing not authorized by effective resolution of directors - - - **286**
See COMPANY **1.**

—— Articles of association—Rotation and retirement of directors—Construction - - - - - **719**
See COMPANY **3.**

DISCOVERY — Interrogatories — Alleged secret trust — Communication by husband to wife—Widow's claim to absolute privilege as to any such communication - - - **620**
See PROCEDURE.

—— Winding-up of company—Order on director of another company to attend for examination and produce debentures and other documents—Order premature and oppressive **32**
See COMPANY **7.**

DONATIO MORTIS CAUSA — *Delivery of bag by donor in contemplation of death—Gift of bag and contents to donee—Bank deposit account book—Not a document of title—Not subject-matter of a valid donatio.*
In re Dillon (1890) 44 Ch. D. 76 and *In re Weston* [1902] 1 Ch. 680 distinguished. DELGOFFE *v.* FADER - **Luxmoore L.J. 922**

DUTY—Bequest of legacy free of duty—Direction referable to English duty only - - - - - **528**
See WILL **5.**

EASEMENT—*Right of support—Housing—Clearance order — Demolition notice — Equivalent support for dominant tenement—Housing Act*, 1930 (20 & 21 *Geo.* 5, *c.* 39)—*Housing Act*, 1936 (26 *Geo.* 5 & 1 *Edw.* 8, *c.* 51), *s.* 26.
BOND *v.* NORMAN. SAME *v.* NOTTINGHAM CORPORATION - - - **Simonds J. 847**

EASEMENT—*continued.*

2. —— *Right of way — Carriageway — Motor-vehicles included.*
LOCK *v.* ABERCESTER, LD. **Bennett J. 861**

EDUCATION—*Elementary school — Conveyance on sale of site for school—School in use for fifty years—Closed as being redundant—Reverter of site to grantor—School Sites Act*, 1841 (4 & 5 *Vict. c.* 38), *s.* 2—*Public Parks, Schools and Museums Act*, 1871 (34 *Vict. c.* 13).
Dennis v. *Malcolm* [1934] Ch. 244 applied. *In re* CAWSTON'S CONVEYANCE AND THE SCHOOL SITES ACT, 1841. HASSARD-SHORT *v.* CAWSTON - - - **Simonds J. 784**

EIRE — Industrial assurance business — Business therein carried on by English company—Proposed transfer to company formed in Eire—No jurisdiction to sanction - **878**
See INSURANCE.

ELEMENTARY SCHOOL — Conveyance on sale of site — Cesser of user as school—Reverter of site to grantor
See EDUCATION. **784**

ESTATE DUTY — Settled property — Accumulations fund — Fund passing on death of settlor—Aggregation
See REVENUE **2.** **343**

—— —— —— Policies — Annuities — Life interests—Aggregation - **610**
See REVENUE **3.**

—— Testator domiciled in Northern Ireland—Estate duty paid on death in Northern Ireland — Annuity bequeathed to wife and charged on residue—Part of proceeds of testator's estate invested in English investments—Subsequent death of annuitant—English estate duty payable - - - - - **131**
See REVENUE **4.**

—— Voluntary settlement — Death of settlor within three years—Increased value of settled funds at date of death—Duty levied on value of settled property at death - **865**
See REVENUE **1.**

EVIDENCE — Interrogatories — Alleged secret trust — Communication by husband to wife—Widow's claim to absolute privilege as to any such communication - - - **620**
See PROCEDURE.

EXECUTORS—Leaseholds forming part of testator's estate—Repairing covenants—Indemnity fund paid into Court — Liability statute-barred — Payment out to beneficiaries **232**
See ADMINISTRATION **1.**

EXECUTORS—*continued.*

—— Mortgage debt of deceased—Action against them undefended—Judgment — Receiver appointed in administration action by executors —Writ of fieri facias—Return of nulla bona—Executors not personally liable - - - - **1007**
See ADMINISTRATION **2.**

FAMILY ARRANGEMENT — Deed — Construction—Trust of balance of income during continuance of one of three annuities — Annuities not a charge on income - - **277**
See ANNUITY.

FLOODING OF MINE — Defendants' construction of water tunnel through land of adjoining owners—Cesser of defendants' control of tunnel or water passing through it—Subsequent flooding of plaintiffs' mine—No liability for damages **393, 800**
See MINES AND MINERALS **1** & **2.**

FOREIGN STATE — Claim by de jure sovereign — Sovereign of another country recognized as de facto sovereign — Successful claim — De facto sovereign afterwards recognized as de jure sovereign—Reversal of decision - - - - **182**
See INTERNATIONAL LAW.

FOREIGN WILL—Will made in France effective in England to pass personalty only—Investments representing the proceeds of sale of settled realty—Will inoperative to pass investments - - - **90**
See WILL **15.**

FORFEITURE—Bequest of annuity—Forfeiture on bankruptcy—Annuitant adjudicated bankrupt in testator's lifetime—Discharge suspended till after testator's death—Forfeiture effective - - - - **974**
See WILL **1.**

FRAUD—Agent required to find house for principal—Purchase by agent of house in name of nominee—Purported repurchase by himself at enhanced price — Purported purchase alone communicated to principal—Sale to principal at yet higher price—Liability of agent to account
See PRINCIPAL AND AGENT. **766**

FRAUD ON POWER—Power to appoint income of fund to husband for life—Exercise of power—Desire to benefit friends — No arrangement with husband for use of income for any one but himself—Valid exercise of power - - - - **11**
See SETTLEMENT **2.**

GIFT—Delivery of bag by donor in contemplation of death—Gift of bag and contents to donee — Bank deposit account book — Not a document of title—Not subject matter of valid donatio - **922**
See DONATIO MORTIS CAUSA.

HIRE-PURCHASE — Finance agreement — Purchase of goods for disposal on hire-purchase agreements — Notes issued charged on all assets—Default in payment — No prior lien for unpaid purchase money — Valid security - - - - **533**
See CONTRACT.

HOTCHPOT CLAUSE—Bequest of shares of residue to children—Advancement of children by testator—Settlement of advancements — Rule for ascertaining capital and income to be brought into hotchpot - **705**
See WILL **17.**

HOUSING — Clearance order — Demolition notice—House with building abutting on it—Right of support—Equivalent support required **847**
See EASEMENT **1.**

HUSBAND AND WIFE — Will of husband—Covenant not to revoke—Death of wife—Revocation of will on remarriage of husband—No breach of covenant - - - - **820**
See DEED OF SEPARATION.

INCOME TAX—Annuity bequeathed "free "of income tax at current rate for "time being deductible at source" —Annuitant not entitled to retain income tax recovered - - **969**
See WILL **12.**

—— Bequest of annuity "free of all duties" and "free of all deductions whatso-"ever"—Payable free of income tax - - - - - **654**
See WILL **2.**

—— *Will* — *Deed of family arrangement* — *Construction* — *Annuities* — *Annuitants entitled to a clear yearly sum "after deduction "of income tax"*—*Reliefs which annuitants might recover* — *Returnable to the estate* — *Finance Act*, 1927 (17 & 18 *Geo.* 5, *c.* 10), *ss.* 39, 40—*General Rules to All Schedules, rr.* 19, 23, *sub-r.* 2.

In re Pettit. Le Fevre v. *Pettit* [1922] 2 Ch. 765 followed.

In re Jones. Jones v. *Jones* [1933] Ch. 842 distinguished.

Decision of Bennett J. affirmed. *In re* MACLENNAN. FEW *v.* BYRNE - **C. A. 750**

INDEMNITY—Leaseholds forming part of testator's estate—Repairing covenants—Indemnity fund in Court—Liability statute-barred—Payment out to beneficiaries - - **232**
See ADMINISTRATION **1.**

INDUSTRIAL ASSURANCE — Business of assurance company carried on in Eire—Proposed transfer of business to company formed in Eire—No jurisdiction to sanction - **878**
See INSURANCE.

INFRINGEMENT OF PATENT — Action — Defence struck out before trial—Certificate that validity of claim in specification in question refused **724**
See PATENT.

INJUNCTION — Covenant against doing anything if in vendor's opinion detrimental to neighbourhood — Covenant for benefit of whole or any part of settled land—Validity—Form of injunction - - **1**
See RESTRICTIVE COVENANTS.

INSOLVENT ESTATE—No personal representative—Creditors' petition for administration in bankruptcy — Jurisdiction - - - **594**
See BANKRUPTCY **4.**

INSURANCE—Company—Various classes of business carried on — Compulsory liquidation—Assets how distributable - - - - - **553**
See COMPANY **5.**

—— *Industrial assurance business — Proposed transfer of business in Eire—Petition for sanction of Court to transfer to company formed in Eire—No jurisdiction to sanction—Assurance Companies Act*, 1909 (9 *Edw.* 7, *c.* 49), *ss.* 1, 13, 14 — *Industrial Assurance Act*, 1923 (13 & 14 *Geo.* 5, *c.* 8), *ss.* 1, 12.
In re PRUDENTIAL ASSURANCE CO., LD. **Simonds J. 878**

INTERNATIONAL LAW — *Recognition de jure of foreign sovereign—Claim by sovereign to fund also claimed by another foreign state—Status of sovereign no longer de facto ruler.*
HAILE SELASSIE *v.* CABLE AND WIRELESS, LD. (No. 2) - **Bennett J. and C. A. 182**

INTERROGATORIES—Alleged secret trust—Communication by husband to wife — Death of husband — Communication not privileged - **620**
See PROCEDURE.

INVESTMENTS—Clause in will directing investment in American securities — Power of trustee—No exclusion of statutory investments - - **684**
See TRUST.

JOINT TENANTS—Conveyance of land to them—Deed of covenant restricting user—Refusal of application by one joint tenant for sale **217, 738**
See COVENANT **1.**

JUDGMENT—French judgment registered in England — Bankruptcy notice validly based on the judgment **601**
See BANKRUPTCY **2.**

JURISDICTION—Charging order on shares —Foreclosure order refused—Sale
See SHARES. **958**

—— Company's scheme of arrangement — Proposed transfer of undertaking to new company for realization and distribution of assets—Ultra vires—No jurisdiction to sanction - **41**
See COMPANY **6.**

—— English company carrying on industrial assurance business in Eire—Proposed transfer to company formed in Eire—No jurisdiction to sanction
See INSURANCE. **878**

—— Insolvent estate—Creditors' petition for administration in bankruptcy—No personal representative - - **594**
See BANKRUPTCY **4.**

—— Order of discharge from bankruptcy subject to suspension—Order made without prejudice to order for payments out of income for benefit of creditors—Subsequent decision that order ended on date of discharge—Order for rehearing of application for discharge—Order making it condition of discharge that payments made - - - - **489**
See BANKRUPTCY **7.**

—— Real estate devised for benefit of public —Scheme—Assent of executors as to part of land with leave of Court—Desire of trustees of charity to retain land unsold for some years—Jurisdiction of Court to postpone sale - - - - - - **410**
See CHARITY **1.**

LAND—*Held by two persons as tenants in common — Adverse possession by one — Co-trustees upon the statutory trusts for sale from January* 1, 1926—*Fiduciary relationship—Statutes of Limitations not applicable from that date*—4 & 5 *Anne, c.* 3—*Real Property Limitation Act*, 1833 (3 & 4 *Will.* 4, *c.* 27), *s.* 12—*Law of Property Act*, 1922 (12 & 13 *Geo.* 5, *c.* 16), *s.* 10—*Law of Property (Amendment) Act*, 1924 (15 *Geo.* 5, *c.* 5), *s.* 10, *Sch. X.*—*Law of Property Act*, 1925 (15 *Geo.* 5, *c.* 20), *ss.* 12, 35, 205.
In re LANDI (DECEASED). GIORGI *v.* NAVANI - - - - - **C. A. 828**

LANDLORD AND TENANT — *Agricultural holding — Lease of land — Clause enabling landlord to resume possession of a portion of demised land without notice—No compensation payable to tenant—Rent proportionately reduced—Whether clause valid—Tenant's right to compensation—Agricultural Holdings Act,*

LANDLORD AND TENANT—*continued.*

1923 (13 & 14 *Geo.* 5, *c.* 9), *s.* 12, *sub-s.* 7; *s.* 25, *sub-s.* 1; *s.* 27, *sub-ss.* 1, 2; s. 50.
In re DISRAELI AGREEMENT AND *In re* THE AGRICULTURAL HOLDINGS ACT, 1923. CLEASBY *v.* PARK ESTATE (HUGHENDEN), LD. - - - - **Crossman J. 382**

2. —— *Demolition and rebuilding — "Improvement" — "Reasonable and suitable "to character" of holding—Landlord and Tenant Act,* 1927 (17 & 18 *Geo.* 5, *c.* 36), *s.* 3, *sub-s.* 1.
F. W. Woolworth & Co., Ld. v. *Lambert* [1937] Ch. 37 and *Lambert* v. *F. W. Woolworth & Co., Ld.* [1938] Ch. 883, considered and distinguished. NATIONAL ELECTRIC THEATRES, LD. *v.* HUDGELL - **Morton J. 553**

LAPSE—Bequest to child of testator contingently on her attaining certain age—Death under that age in lifetime of testator - - **780**
See WILL **9.**

LEASE — Agricultural holding — Clause enabling landlord to resume possession of part of land without notice—No compensation payable to tenant—Rent proportionately reduced—Validity of clause - - - **382**
See LANDLORD AND TENANT **1.**

—— Leaseholds — Repairing covenants — Indemnity of executors against liability—Fund in Court—Liability statute-barred — Payment out to beneficiaries - - - - **232**
See ADMINISTRATION **1.**

—— —— Wasting property — Will — No trust for sale or conversion—Implied trust for sale with power to postpone sale indefinitely - - - **200**
See ADMINISTRATION **4.**

—— Long leases — Proposal to demolish and rebuild — "Improvement" — "Reasonable and suitable to character" of holding - - **553**
See LANDLORD AND TENANT **2.**

LEGACY—Annuities—Settlement of capital required to produce annuities—Estate insufficient for payment in full—Capital required to produce annuities treated as settled legacy and abated with legacies - **794**
See WILL **3.**

—— Bequest free of duty — Direction referable to English duty only **528**
See WILL **5.**

—— Condition of adoption of child—Petition for adoption refused—Failure of condition—Trust created for maintenance of child - - - **700**
See WILL **6.**

LEGACY—*continued.*

—— Secret trust—Sum given on verbal trusts communicated to trustees—Additional sum given on secret trusts by later testamentary disposition — No communication to trustees—Failure of second gift
See WILL **8.** **580, 811**

—— "Securities" — Whether stocks and shares in companies and government stocks included—"Money"—Residuary personal estate - - **1015**
See WILL **14.**

LOAN—Director of company—Advances to subsidiary companies for benefit of company—Advances made at request of secretary — Borrowing not authorized by effective resolution of directors - - - - **286**
See COMPANY **1.**

LOCAL AUTHORITY — *Company — Unpaid rates—Petition by local authority to wind up company—Companies Act,* 1929 (19 & 20 *Geo.* 5, *c.* 23), *ss.* 170, 264.
In re THE NORTH BUCKS FURNITURE DEPOSITORIES, LD. - - **Crossman J. 690**

—— Person of unsound mind — Old age pensioner—Maintained at a rate-aided institution—County council officer appointed receiver—Direction to accumulate old age pension—Charge on patient's pension for maintenance—Right form of order
See PERSON OF UNSOUND MIND. **260**

LOCAL GOVERNMENT — *Air raid precautions — Deep shelter — Scheme of Metropolitan Borough Council disapproved by Minister—Proposed grant of building lease of part of clearance area to a company—Company to construct underground shelter and relet to council — Validity — London Government Act,* 1899 (62 & 63 *Vict. c.* 14)—*Housing Act,* 1936 (26 *Geo.* 5 & 1 *Edw.* 8, *c.* 51)—*Air Raid Precautions Act,* 1937 (1 & 2 *Geo.* 6, *c.* 6), *ss.* 1, 3, 7.
ATT.-GEN. *v.* FINSBURY BOROUGH COUNCIL **Simonds J. 892**

—— Poor law officer—Appointment under statutory powers—Deductions from pay during illness—Claim to recover deductions—Protection of Public Authorities Protection Act - **771**
See PUBLIC AUTHORITY.

2. —— *Town planning — Land privately owned used as a club—Resolutions to prepare scheme—Subsequent negotiations with owners for town planning the land—Appointment of sub-committee by local authority—Agreement negotiated by sub-committee with owners—Ratification by local authority—Delegation—Validity of agreement after resolution adopting*

LOCAL GOVERNMENT—*continued.*

draft scheme—Town and Country Planning Act, 1932 (22 *&* 23 *Geo.* 5, *c.* 48), *ss.* 34, 48—*Local Government Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 51), *s.* 85.
Att.-Gen. *v.* Barnes Corporation and Ranelagh Club, Ld. - **Luxmoore J. 110**

LUNACY—Person of unsound mind—Old age pensioner—Maintained at a rate-aided institution — County council officer appointed receiver — Direction to accumulate old age pension—Charge on pension for maintenance—Right form of order - - **260**
See Person of Unsound Mind.

MAINTENANCE — Settlement dated before January 1, 1926—Exercise of power of appointment after that date—Application of Trustee Act, 1925, s. 31 - - - - - **27**
See Marriage Settlement.

MARRIAGE SETTLEMENT — *Power of appointment — Document dated prior to January* 1, 1926—*Exercise of the power subsequent to that date — Maintenance — Whether* s. 31 *of the Trustee Act,* 1925, *applies —Trustee Act,* 1925 (15 *Geo.* 5, *c.* 19), *s.* 31, *sub-s.* 5.
In re Dickinson's Settlements. Bickersteth *v.* Dickinson - **Crossman J. 27**

MINES AND MINERALS—*Flooding of mine —Defendants' construction of water tunnel through land of adjoining mineowners—Water passing through tunnel from neighbouring area through a mine to defendants' pumping pit—Cesser of defendants' control of tunnel or water passing through it—Subsequent stopping of pumping—Resulting flooding of plaintiffs' mine—No liability for damages.*
Decision of Luxmoore L.J. (ante p. 393) affirmed, but for different reasons. Westhoughton Coal and Cannel Co., Ld. *v.* Wigan Coal Corporation, Ld. **C. A. 800**

2. —— —— *Discharge of water through tunnel to pumping pit—Cessation of pumping —Removal of barriers by other parties—Flooding of workings not in existence when tunnel made—No liability for damage caused by escape of water.*
Smith v. *Kenrick* (1849) 7 C. B. 515 and *Baird* v. *Williamson* (1863) 15 C. B. (N. S.) 376 considered. Westhoughton Coal and Cannel Company, Ld. *v.* Wigan Coal Corporation, Ld. - **Luxmoore L.J. 393**

MISTAKE—Action commenced in firm name —Substituting plaintiff - **569**
See Practice **3.**

—— Contract for sale of land—Mistake on plan—No case for rectification—Damages - - - - **588**
See Vendor and Purchaser.

MONEYLENDER — Purchase of goods by company for disposal on hire-purchase agreements—Notes issued charged on all assets—Default in payment — Valid security — Not moneylending transaction - **531**
See Contract.

MORTGAGE—Building society—Advance on security of house coupled with collateral security—Whether ultra vires - - - - - **520**
See Building Society.

—— Mortgage debt of deceased — Action against executors undefended — Judgment — Writ of fieri facias issued — Return of nulla bona — Intervening administration action by beneficiaries—Receiver appointed —Executors not personally liable
See Administration **2.** **1007**

—— *Real estate—Demise for long term—Covenant for repayment by eighty half-yearly instalments—Not an infringement of the rule against perpetuities—Clog on equity of redemption.*
Knightsbridge Estates Trust, Ld. *v.* Bryne and Others - - - **C. A. 441**

MOTOR VEHICLES — Easement for a carriageway — Motor vehicles included - - - - - - **861**
See Easement **2.**

MUNICIPAL CORPORATION — Tramway undertaking — Employees' superannuation fund — Contributory scheme — Actuarial deficiency in fund — Stoppage of payment by corporation—Scheme intra vires—No contract between members of fund and corporation - - **422**
See Corporation.

NORTHERN IRELAND—Testator domiciled there—No part of testator's estate in English investments at his death —Annuity bequeathed to wife and charged on residue—Part of proceeds of testator's estate invested in English investments—Subsequent death of annuitant—Estate duty payable in England - - **131**
See Revenue **4.**

OLD AGE PENSION—Pensioner a person of unsound mind—Maintained at a rate-aided institution — County council officer appointed receiver—Direction to accumulate old age pension—Charge on pension for maintenance—Right form of order
See Person of Unsound Mind. **260**

PARTIES—Action commenced in firm name —Bona fide mistake—Substitution of plaintiff - - - - **569**
See Practice **3.**

PATENT — *Infringement* — *Pleadings* — *Defence struck out before trial* — *Validity* — *Action "proceeding to trial"*—*Patents and Designs Acts,* 1907 *to* 1938 (7 *Edw.* 7, *c.* 29; 4 *&* 5 *Geo.* 5, *c.* 18; 9 *&* 10 *Geo.* 5, *c.* 80; 18 *Geo.* 5, *c.* 3; 22 *&* 23 *Geo.* 5, *c.* 32; *and* 1 *&* 2 *Geo.* 6, *c.* 29), *s.* 35—*Rules of the Supreme Court, Order* XXXI., *r.* 21; *Order* LIII.A, *r.* 20.
Babcock and Wilcox, Ld. v. *Water Tube Boiler and Engineering Co.* (1910) 27 R. P. C. 626, followed. Superma, Ld., and Sartory *v.* Tenconi - - - **Morton J. 724**

PERPETUITY — Mortgage by demise — Covenant for repayment by eighty half-yearly instalments — No infringement of rule against perpetuities - - - - **441**
See Mortgage.

PERSON OF UNSOUND MIND — *Old age pensioner* — *Maintained in a rate-aided institution* — *Order in Lunacy* — *Public Assistance Officer of County Council appointed receiver of moneys derived from old age pension*—*Charge on patient's pension*—*Maintenance* — *Local authority's jurisdiction over old age pension*—*Whether old age pension applicable in aid of local rates*—*Widows', Orphans' and Old Age Contributory Pensions Act,* 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 33), *s.* 21, *sub-s.* 1; *s.* 32, *sub-s.* 2 (*f*); *Third Schedule.*
In re T. R. M. (a person of unsound mind) (53 Vict. c. 5, and Amending Acts)
Lords Justices sitting in Lunacy 260

PETITION—Debtor resident abroad—Service in sealed envelope — Service insufficient—Registrar's discretion
See Bankruptcy **3.**

PLEADINGS—Patent action—Infringement —Defence struck out before trial—Certificate that validity of claim in specification came in question refused - - - - **724**
See Patent.

POOR LAW—Officer appointed by public authority under statutory powers —Deductions from pay during illness—Claim to recover deductions —Protection of Public Authorities Protection Act - - - **771**
See Public Authority.

PORTIONS—Rule against double portions —Trustees' power to deal with residuary estate for benefit of testator's children or grandchildren —Rule inapplicable - - **465**
See Will **13.**

POWER—Trustees' power to distribute residuary estate among testator's children and grandchildren—Direction that all dealings to be within the limitations prescribed by law—Valid provision - - - **465**
See Will **13.**

POWER—*continued.*

—— Trustees' power to invest in "stocks, "funds and securities"—Shares in limited company included - **858**
See Settlement **4.**

POWER OF APPOINTMENT — *Marriage settlement*—*Wife's power of appointment to children*—*Trust in default of appointment*—*Voluntary settlement by son of his interest*—*Power subsequently exercised in his favour*—*Sum appointed payable to him.*
In re Ellenborough. Towry Law v. *Burne* [1903] 1 Ch. 697 and *Lovett* v. *Lovett* [1898] 1 Ch. 82 followed. *In re* Brooks' Settlement Trusts. Lloyds Bank, Ld. *v.* Tillard - - - - - **Farwell J. 993**

—— Power created under document dated before January 1, 1926—Exercise of power after that date—Application of Trustee Act, 1925, s. 31 **27**
See Marriage Settlement.

—— Power to appoint income of fund to husband for life—Appointor's desire to benefit friends—Marriage and exercise of power—No arrangement for use of income for benefit of any one but husband—No fraud on power - - - - **11**
See Settlement **2.**

2. —— *Special power*—*Release of power to appoint in favour of named object*—*Later appointment in favour of same object*— *Validity* —*Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *s.* 155.
In re Evered [1910] 2 Ch. 147, considered. *In re* Brown's Settlement. Public Trustee *v.* Brown - - **Morton J. 944**

POWER OF SALE—Will—Power conferred on trustees with consent of annuitant—Death of testator before 1926 —Effect of Settled Land Act, 1925— Trustees becoming statutory owners —Power of sale without consent
See Will **16.** **205**

PRACTICE — *Appeal* — *Mistake as to effect of rule*—*Time for appealing expired* —— *Discretion of Court to grant leave to appeal*—*Order* LVIII., *r.* 15; *Order* LXIV., *r.* 7.
Gatti *v.* Shoosmith - - **C. A. 841**

—— —— Notice to registrar—Time for giving it—"Forthwith" - - **694**
See Bankruptcy **1.**

—— Bankruptcy — Order for discharge subject to suspension—Order made without prejudice to order for future payments for benefit of creditors—Subsequent decision that payments end on discharge—Order for rehearing of application for discharge—Order made conditional on future payments for benefit of creditors—Jurisdiction - **489**
See Bankruptcy **7.**

PRACTICE—*continued.*

—— Charging order on shares — Foreclosure not ordered—Sale - - **958**
See SHARES.

—— Debtor resident abroad—Petition — Service in sealed envelope—Service insufficient—Registrar's discretion
See BANKRUPTCY. **251**

2. —— *Evidence—Interrogatories—Alleged secret trust—Communication by husband to wife—Death of husband—Widow's absolute privilege from discovery—Evidence Amendment Act,* 1853 (16 *&* 17 *Vict. c.* 83), *s.* 3.
SHENTON *v.* TYLER - **Simonds J. 271**
(*But see* PROCEDURE.)

3. —— *Parties—Aiding or substituting plaintiff—Action commenced in firm name—Bona fide mistake—R. S. C., Order* XVI., *r.* 2; *Order* XLVIII.A, *r.* 1.
NOBLE LOWNDES AND PARTNERS (A FIRM) *v.* HADFIELDS, LD. SAME *v.* SAME
Farwell J. 569

PRIEST—Bequest for relief of infirm, sick and aged Roman Catholic priests—Good charitable bequest - **22**
See CHARITY **2.**

PRINCIPAL AND AGENT—*Agent required to find house—Purchase by agent of suitable house in name of his own nominee—Purported resale to himself at higher price—Principal told that agent had bought house for himself at that price—Resale to principal at yet higher price—Whether agency terminated.*
REGIER *v.* CAMPBELL-STUART
Farwell J. 766

PRIVILEGE—Interrogatories—Alleged secret trust—Communication by husband to wife—Death of husband—Communication not privileged - **620**
See PROCEDURE.

PROCEDURE — *Interrogatories — Alleged secret trust—Communication by husband to wife—Death of husband—Communication not privileged—Evidence Act,* 1843 (6 *&* 7 *Vict. c.* 85)—*Evidence Act,* 1851 (14 *&* 15 *Vict. c.* 99), *ss.* 2, 3—*Evidence Amendment Act,* 1853 (16 *&* 17 *Vict. c.* 83), *ss.* 1, 2, 3—*Criminal Evidence Act,* 1898 (61 *&* 62 *Vict. c.* 36), *s.* 1 (*d*).
Decision of Simonds J. (ante p. 271) reversed. SHENTON *v.* TYLER - **C. A. 620**

PUBLIC AUTHORITY — *Poor law officer appointed by public authority under statutory powers—Deductions from pay during illness—Sick pay regulations not disclosed to officer—Implied term—Authority compelled by statute to make appointment—Breach of contract by authority alleged by officer—Limitation of time for commencing proceedings — Public Authorities Protection Act,* 1893 (56 *&* 57 *Vict. c.* 61), *s.* 1.
COMPTON *v.* COUNCIL OF THE COUNTY BOROUGH OF WEST HAM - **Crossman J. 771**

RANELAGH CLUB — Town planning — Resolutions to prepare scheme — Subsequent negotiations with owners of club for town planning the land—Agreement negotiated by sub-committee and ratified by local authority—Valid agreement **110**
See LOCAL GOVERNMENT **2.**

RATES—Unpaid by company — Petition by local authority to wind-up company - - - - **690**
See LOCAL AUTHORITY.

REAL PROPERTY—Demise to tenant for life and after her death to persons in undivided shares—Death of tenant for life—Request of testator's personal representative to have land vested in him—Settlement deemed to be still subsisting - **513**
See SETTLEMENT **3.**

RE-ISSUE — Redeemed debenture stock — Fixed date for redemption—Re-issue must be with same date of redemption - - - - **732**
See COMPANY **4.**

RELEASE—Special power of appointment—Release in favour of named object—Valid release - - - **944**
See POWER OF APPOINTMENT **2.**

RESTRICTIVE COVENANTS — *Nothing to be done if in vendor's opinion detrimental to neighbourhood—Covenant for benefit of whole or part of land remaining unsold or sold by vendor or successors in title with express benefit of covenant—Part of land a mile distant—Sale of fried fish for consumption off premises—Action to restrain by vendor's successor in title—Form of injunction.*
In re Ballard's Conveyance [1937] Ch. 473 distinguished.
MARQUESS OF ZETLAND *v.* DRIVER **C. A. 1**

—— Not to carry on trade or business — Exception of "school or seminary" —School of music—Breach of covenant—Right to enforce—No building scheme—Mutual rights of owners of subdivided plot - - **656**
See COVENANT **2.**

REVENUE—Annuity bequeathed "free of "income tax at current rate for "time being deductible at source" —Annuitant not entitled to retain income tax recovered - - **969**
See WILL **4.**

—— *Estate Duty — Voluntary settlement on family—Death of settlor within three years —Changes of investment and increase of value of settled funds—Duty levied on settled property as at date of death—Ascertainment of value—Finance Act,* 1894 (57 *&* 58 *Vict. c.* 30), *s.* 2, *sub-s.* 1 (*c*); *s.* 5, *sub-s.* 1; *s.* 7, *sub-s.* 5—

REVENUE—*continued.*
Finance (1909-10) *Act,* 1910 (10 *Edw.* 7, *c.* 8), *s.* 59.
Lord Strathcona v. *Inland Revenue,* 1929, S. C. 800, considered.
In re Hodson's Settlement, ante p. 343, applied as to aggregation . *In re* PAYNE'S DECLARATION. *In re* PAYNE (DECEASED). POPLETT *v.* ATT.-GEN. - **Simonds J. 865**

2. —— —— *Settled property—Accumulations fund—Fund passing on death of settlor—Aggregation—Finance Act,* 1894 (57 *&* 58 *Vict. c.* 30), *s.* 1; *s.* 2, *sub-s.* 1 (*b*) *and* (*d*); *s.* 4.
Decision of the Court of Appeal in *Att.-Gen.* v. *Lloyds Bank, Ld.* (1934) 151 L. T. 268 not followed.
Adamson v. *Att.-Gen.* [1933] A. C. 257 as explained in *Att.-Gen.* v *Lloyds Bank, Ld.* [1935] A. C. 382, 397, and *Scott* v. *Inland Revenue Commissioners* [1935] Ch. 246, 265; [1937] A. C. 174 distinguished.
Att.-Gen. v. *Dickinson and Baron* [1937] 2 K. B. 574 approved.
Decision of Farwell J. [1938] Ch. 916 reversed. *In re* HODSON'S SETTLEMENT. BROOKS *v.* ATT.-GEN. - - **C. A. 343**

3. —— —— —— —— *Policies—Annuities—Life interests—Aggregation—Finance Act,* 1894 (57 *&* 58 *Vict. c.* 30), *s.* 1; *s.* 2, *sub-s.* 1 (*d*).
In re Hodson's Settlement, ante p. 343, followed.
Decision of Farwell J. varied. WESTMINSTER BANK, LD. *v.* ATT.-GEN. **C. A. 610**

4. —— —— *Testator domiciled in Northern Ireland—Annuity bequeathed to wife and charged on residue—Testator's estate partly in Northern Ireland—Estate duty paid to Ministry of Finance in Northern Ireland—Part of proceeds of testator's estate invested in English investments—Widow's interest in English investments ceasing on her death—Estate duty payable on English investments on her death—Finance Act,* 1894 (57 *&* 58 *Vict. c.* 30), *s,* 2, *sub-ss.* 1, *para.* (*b*), 2; *ss.* 5, 7, *sub-s.* 10; *s.* 22, *sub-s.* 1, *para.* (*e*)—*Finance Act,* 1914 (4 *&* 5 *Geo.* 5, *c.* 10), *s.*14—*Meaning of "estate duty"—Finance Act,* 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 34), *ss.* 24, 25—*Government of Ireland Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 67), *ss.* 28, 61—*Government of Ireland* (*Adaptation of the Taxing Acts*) *Order,* 1922.
Att.-Gen. v. *Watson* [1917] 2 K. B. 427 followed; *Att.-Gen.* v. *Johnson* [1907] 2 K. B. 885 considered.
In re WHITE. SKINNER *v.* ATT.-GEN. **C. A. 131**

REVERTER—Conveyance on sale of site of elementary school—Use as school for 50 years — Cesser of use — Reversion of site to grantor - **784**
See EDUCATION.

RIGHT OF SUPPORT—Housing—Clearance order—Demolition order — Equivalent support for dominant tenement required - - - - **847**
See EASEMENT **1.**

RULE AGAINST PERPETUITIES — Mortgage by demise—Covenant for repayment by eighty half-yearly instalments—No infringement of rule - - - - **441**
See MORTGAGE.

—— Residuary gift — Construction — Validity - - - - **465**
See WILL **13.**

RULES AND ORDERS :—

—— *Bankruptcy Rules,* 1915, *rr.* 132, 385, 386. *In re* MUSCOVITCH **C. A. 694**

—— —— *rr.* 155, 156, 158: *In re* A DEBTOR **C. A. 251**

—— —— *r.* 303. *In re* A DEBTOR **Morton J. 594**

—— *General Rules to All Schedules of Income Act,* 1894, *rr.* 19, 23, *sub-r.* 2. *In re* MACLENNAN - **C. A. 750**

—— *Government of Ireland* (*Adaptation of the Taxing Acts*) *Order,* 1922. *In re* WHITE - - - **C. A. 131**

—— *R. S. C., Order* IX., *r.* 2: *In re* A DEBTOR - - - **C. A. 251**

—— *R. S. C., Order* XVI., *r.* 2. NOBLE LOWNDES AND PARTNERS *v.* HADFIELDS, LD. - **Farwell J. 569**

—— *R. S. C., Order* XXXI., *r.* 21. SUPERMA, LD. *v.* TENCONI - **Morton J. 724**

—— *R. S. C., Order* XLVIII.A, *r.* 1. NOBLE LOWNDES AND PARTNERS *v.* HADFIELDS, LD. - **Farwell J. 569**

—— *R. S. C., Order* LIII., *r.* 20. SUPERMA LD. *v.* TENCONI - **Morton J.724**

—— *R. S. C., Order* LVIII., *r.* 15. GATTI *v.* SHOOSMITH - - **C. A. 841**

—— *R. S. C., Order* LXI., *r.* 7. GATTI *v.* SHOOSMITH - - **C. A. 841**

SALE OF GOODS—Verbal order by buyer's agent—Goods delivered—Received by buyer's employee—Enforceable contract to buy the goods - **225**
See BANKRUPTCY **6.**

SALE OF LAND—Covenant for benefit of whole or any part of settled land—Nothing to be done if in vendor's opinion detrimental to neighbourhood—Decision without hearing defendants—Validity of covenant—Form of injunction - - **1**
See RESTRICTIVE COVENANTS.

—— Plan on contract—Mistake—Parties not ad idem—Damages - - **588**
See VENDOR AND PURCHASER.

SCHEME OF ARRANGEMENT — Proposed transfer of undertaking of insolvent company to new company for realization and distribution of assets —Ultra vires — No jurisdiction to sanction - - - - - **41**
See COMPANY **6.**

SCHOOL OF MUSIC—Restrictive covenants —Not to carry on trade or business —Exception of "school or seminary" — Breach of covenant — Right to enforce—Mutual rights of owners of subdivided plot - **656**
See COVENANT **2.**

SCHOOL SITE—Conveyance on sale—Use as elementary school for 50 years—Cesser of user—Reverter of site to grantor - - - - - **784**
See EDUCATION.

SECRET TRUST—Sum bequeathed on valid trusts communicated to trustees—Additional sum given on secret trusts not communicated to trustees —Invalidity of later gift
See WILL **8.** **580, 811**

SETTLED LAND—Land devised subject to charges by wills of settlor and his son and his grandson — Compound settlement—Trust for sale in grandson's will only—No trust for sale of whole property - - **51**
See SETTLEMENT **1.**

—— Tithe rentcharge — Redemption annuity—Tenant for life and remainderman — Annual payments to be borne by tenant for life - **77**
See TITHE RENTCHARGE **2.**

SETTLED PROPERTY — Accumulations — Policies — Annuities — Estate duty —Property passing or deemed to pass at death of settlor - **610**
See REVENUE **3.**

SETTLEMENT—*Charge of annual sums—Land devised subject to charges by wills of settlor and his son and grandson—Compound settlement—Trust for sale in grandson's will only—Same persons trustees of wills of son and grandson—No trust for sale of whole of property—Settled Land Act,* 1925 (15 *Geo.* 5, *c.* 18), *s.* 1, *sub-s.* 1 (*v.*); *s.* 20, *sub-s.* 1 (*viii.*); *s.* 31, *sub-s.* 1; *s.* 117, *sub-s.* 1 (*xxx.*)—*Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *s.* 205, *sub-s.* 1 (*xxix.*)—*Law of Property (Amendment) Act,* 1926 (16 *&* 17 *Geo.* 5, *c.* 11), *Schedule.*
In re Parker's Settled Estates [1928] Ch. 247 (in which the interpretation of the phrase "immediate binding trust for sale" adopted by Tomlin J. in *In re Leigh's Settled Estates* [1926] Ch. 852 and *In re Leigh's Settled Estates* (*No.* 2) [1927] 2 Ch. 13, was not followed) and *In re Norton* [1929] 1 Ch. 84, considered and followed.
In re Astor [1922] 1 Ch. 364, followed.
In re SHARPE'S DEED OF RELEASE. SHARPE AND FOX *v.* GULLICK AND OTHERS
Morton J. 51

—— Investments representing proceeds of sale of settled realty—French will effective in England to pass personalty only—Will inoperative to pass the investments - **90**
See WILL **15.**

—— Life annuity—Direction to accumulate surplus income—Gift of accumulations after death of annuitant—Termination of period of accumulation in lifetime of annuitant—Destination of income of accumulations - - - - - **205**
See WILL **16.**

—— Power of appointment — Document dated prior to January 1, 1926—Exercise of that power after that date—Application of Trustee Act, 1925, s. 31 - - - - **27**
See MARRIAGE SETTLEMENT.

2. —— *Power to appoint income of a fund to husband for life—Appointor's wish to benefit friends—Marriage of appointor when over eighty years of age—Exercise of power—No arrangement between appointor and appointee as to use of income for benefit of any one but himself—No fraud on power.*
Decision of Farwell J. [1938] Ch. 308 affirmed. *In re* NICHOLSON'S SETTLEMENT. MOLONY *v.* NICHOLSON. *In re* SAME. SAME *v.* SAME - - - - - **C. A. 11**

—— Settled property—Accumulations Fund —Fund passing on death of settlor—Liability to Estate Duty—Aggregation - - - - - **343**
See REVENUE **2.**

3. —— *Tenant for life—Land devised to tenant for life and, after death of tenant for life, in trust for persons in undivided shares—Right of personal representative of testator to have the land vested in him—Settlement deemed to be notionally subsisting after death of tenant for life—Settled Land Act,* 1925 (15 *Geo.* 5, *c.* 18), *s.* 30, *sub-s.* 3; *s.* 36, *sub-s.* 1.
In re Cugny's Will Trusts [1931] 1 Ch. 305 followed. *In re* JOHN THOMAS (DECEASED)
Bennett J. 513

4. —— *Trustees—Power to invest in "stocks, funds and securities"—Shares in limited company, whether included.*
In re Willis. Spencer v. *Willis* [1911] 2 Ch. 563 distinguished. *In re* MCEACHARN'S SETTLEMENT TRUSTS. HOBSON *v.* MCEACHARN - - - **Bennett J. 858**

SETTLEMENT—*continued.*

5. —— *Voluntary settlement—Covenant to settle after-acquired property — Refusal of settlor to implement covenant—Application by trustees for directions—Trustees directed not to take proceedings.*

In re Pryce [1917] 1 Ch. 234 followed and applied. *In re* KAY'S SETTLEMENT. BROADBENT *v.* MACNAB - - **Simonds J. 329**

—— —— Death of settlor within three years—Increased value of settled funds at death—Estate duty payable on value at that date - - **865**
See REVENUE **1.**

—— Wife's power of appointment to children—Voluntary settlement by son of his interest—Power subsequently executed in his favour — Sum appointed payable to son - **993**
See POWER OF APPOINTMENT **1.**

SHARE CERTIFICATE—Company's articles of association — Right of shareholder to subdivision of shares included in a single certificate **373**
See COMPANY **2.**

SHARES—*Charging order—Foreclosure — Sale—Practice—Convenience—Jurisdiction—Judgments Act,* 1838 (1 *&* 2 *Vict. c.* 110), *s.* 14.

D' Auvergne v. *Cooper* [1899] W. N. 256, and *Attwood* v. *Gibbons* (unreported), followed.

Hosack v. *Robins* [1917] 1 Ch. 142; 332, considered. DAPONTE *v.* SCHUBERT AND ROY NOMINEES, LD. - - **Morton J. 958**

SPECIAL POWER OF APPOINTMENT—Power to appoint to husband for life—Desire to benefit friends—Marriage and exercise of power—No arrangement for use of income for any one but appointee—No fraud on power - - - **11**
See SETTLEMENT **2.**

—— Release of power in favour of named object—Valid release - **944**
See POWER OF APPOINTMENT **2.**

—— Settlement—Wife's power to appoint to children—Voluntary settlement by son of his interest — Power subsequently exercised in his favour—Sum appointed payable to son **993**
See POWER OF APPOINTMENT **1.**

STATUTORY TRUSTS—Tenants in common—Adverse possession by one of them—Effect if they become trustees on statutory trusts on January 1, 1926—Statutes of Limitations inapplicable - - - - **828**
See LAND.

STATUTES :—

1833.

3 & 4 Will. 4, c. 27 (Real Property Limitation), s. 12: *In re* LANDI **C. A. 828**

1837.

1 Vict. c. 26 (Wills), ss. 18, 20: *In re* MARSLAND - - - **C. A. 820**

—— —— s. 33: *In re* WOLSON **Crossman J. 780**

1838.

1 & 2 Vict. c. 110 (Judgments), s. 14: DAPONTE *v.* SCHUBERT AND ROY NOMINEES, LD. - **Morton J. 958**

1841.

4 & 5 Vict. c. 38 (School Sites), s. 2: *In re* CRAWSTON'S CONVEYANCE **Simonds J. 784**

1843.

6 & 7 Vict. c. 85 (Evidence): SHENTON *v.* TYLER - - - **C. A. 620**

1851.

14 & 15 Vict. c. 99 (Evidence), ss. 2, 3: SHENTON *v.* TYLER - **C. A. 620**

1853.

16 & 17 Vict. c. 83 (Evidence Amendment), ss. 1, 2, 3: SHENTON *v.* TYLER **Simonds J. 271 and C. A. 620**

1861.

24 & 25 Vict. c. 114 (Wills), s. 1: *In re* CARTWRIGHT **Bennett J. and C. A. 90**

1868.

31 & 32 Vict. c. 54 (Judgments (Extension)), ss. 3, 4, 6: *In re* A JUDGMENT DEBTOR - - - **C. A. 601**

1871.

34 Vict. c. 13 (Public Parks, Schools and Museums): *In re* CAWSTON'S CONVEYANCE - - **Simonds J. 784**

1874.

37 & 38 Vict. c. 42 (Building Societies), ss. 13, 25: BRADFORD THIRD EQUITABLE BENEFIT BUILDING SOCIETY *v.* BORDERS **Bennett J. 520**

1891.

54 & 55 Vict. c. 73 (Mortmain and Charitable Uses), ss. 5, 6, 8: *In re* GORHAM CHARITY GIFT **Crossman J. 410**

1893.

56 & 57 Vict. c. 53 (Trustee), s. 1: *In re* WARREN - - **Simonds J. 684**

STATUTES—*continued.*

56 & 57 Vict. c. 61 (Public Authorities), s. 1: Compton *v.* West Ham Borough Council **Crossman J. 771**

56 & 57 Vict. c. 71 (Sale of Goods), s. 4, sub-ss. 1, 3; s. 35: *In re* A Debtor **Div. Ct. 225**

1894.

57 & 58 Vict. c. 30 (Finance), s. 1; s. 2, sub-s. 1 (*b*) and (*d*); s. 4: *In re* Hodson's Settlement - **C. A. 343**

—— —— s. 1; s. 2, sub-s. 1 (*d*): Westminster Bank, Ld. *v.* Att.-Gen. **C. A. 610**

—— —— s. 2, sub-ss. 1 (*b*), 2; ss. 5, 7, sub-s. 10; s. 22, sub-s. 1 (*e*): *In re* White - - - **C. A. 131**

—— —— s. 2, sub-s. 1 (*c*); s. 5, sub-s. 1; s. 7, sub-s. 5: *In re* Payne's Declaration - **Simonds J. 865**

1898.

61 & 62 Vict. c. 36 (Criminal Evidence), s. 1 (*d*): Shenton *v.* Tyler **C. A. 620**

1899.

62 & 63 Vict. c. 14 (London Government): Att.-Gen. *v.* Finsbury Borough Council - - **Simonds J. 892**

1900.

63 & 64 Vict. c. 51 (Moneylenders), s. 6 (*d*): Transport and General Credit Corporation, Ld. *v.* Morgan **Simonds J. 531**

1907-1938.

7 Edw. 7, c. 29; 4 & 5 Geo. 5, c. 18; 9 & 10 Geo. 5, c. 80; 18 Geo. 5, c. 3; 22 & 23 Geo. 5, c. 32; and 1 & 2 Geo. 6, c. 29 (Patents and Designs), s. 35: Superma, Ld. *v.* Tenconi **Morton J. 724**

1909.

9 Edw. 7, c. 49 (Assurance Company), ss. 1, 13, 14: *In re* Prudential Assurance Co., Ld. **Simonds J. 878**

—— —— ss. 2, 3, 4, 5: *In re* London General Insurance Co. **Bennett J. 553**

1910.

10 Edw. 7, c. 8 (Finance), s. 59: *In re* Payne's Declaration **Simonds J. 865**

1914.

4 & 5 Geo. 5, c. 10 (Finance), s. 14: *In re* White - - - **C. A. 131**

4 & 5 Geo. 5, c. 59 (Bankruptcy), s. 1: *In re* A Judgment Debtor **C. A. 601**

STATUTES—*continued.*

4 & 5 Geo. 5, c. 59 (Bankruptcy), s. 5, sub-ss. 1, 3: *In re* A Debtor **C. A. 251**

—— —— s. 5, sub-s. 3: *In re* A Debtor **C. A. 145**

—— —— s. 19: *In re* Beale **Farwell J. 761**

—— —— s. 26, sub-ss. 1, 2; s. 51, sub-s. 2; s. 108, sub-s. 1: *In re* A Debtor - - **C. A. 489**

—— —— ss. 28, 38: *In re* Walker **Luxmoore L.J. 974**

—— —— s. 109, sub-s. 4: *In re* Muscovitch - - - **C. A. 694**

—— —— s. 130, sub-s. 2: *In re* A Debtor - - - **Morton J. 594**

1920.

10 & 11 Geo. 5, c. 67 (Government of Ireland), ss. 28, 61: *In re* White **C. A. 131**

10 & 11 Geo. 5, c. 81 (Administration of Justice), s. 9: *In re* A Judgment Debtor - - - **C. A. 601**

1922.

12 & 13 Geo. 5, c. 16 (Law of Property), s. 10: *In re* Landi - **C. A. 828**

1923.

13 & 14 Geo. 5, c. 8 (Industrial Assurance), ss. 1, 12: *In re* Prudential Assurance Co., Ld. **Simonds J. 878**

13 & 14 Geo. 5, c. 9 (Agricultural Holdings), s. 12, sub-s. 7; s. 25, sub-s. 1; s. 27, sub-ss. 1 and 2; s. 50: *In re* Disraeli Agreement **Crossman J. 382**

1924.

15 Geo. 5, c. 5 (Law of Property Amendment), s. 10, Sch. X.: *In re* Landi **C. A. 828**

1925.

15 Geo. 5, c. 18 (Settled Land), ss. 5, 13; s. 23, sub-s. 1; ss. 75, 108, 109: *In re* Jefferys - **Farwell J. 205**

—— —— s. 30, sub-s. 3; s. 36, sub-s. 1: *In re* Thomas - **Bennett J. 513**

—— —— s. 75, sub-s. 5: *In re* Cartwright - **Bennett J. and C. A. 90**

15 Geo. 5, c. 19 (Trustee), s. 31, sub-s. 5: *In re* Dickinson's Settlements **Crossman J. 27**

—— —— s. 69, sub-s. 2: *In re* Warren **Simonds J. 684**

15 Geo. 5, c. 20 (Law of Property), ss. 12, 35, 205: *In re* Landi **C. A. 828**

STATUTES—*continued.*

15 Geo. 5, c. 20 (Law of Property), ss. 25, 30, 35, 36: *In re* Buchanan-Wollaston's Conveyance - **C. A. 738**

—— —— s. 28, sub-s. 2; s. 35: *In re* Berton - - **Clauson L.J. 200**

—— —— ss. 35, 36: *In re* Buchanan-Wollaston's Conveyance **Farwell J. 217**

—— —— s. 155: *In re* Brown's Settlement - **Morton J. 944**

—— —— s. 164: *In re* Jefferys **Farwell J. 205**

15 Geo. 5, c. 23 (Administration of Estates), s. 34, sub-s. 3; Sch. I., Part II.: *In re* Sanger - **Simonds J. 238**

—— —— s. 36, sub-s. 2: *In re* Gorham's Charity Gift - **Crossman J. 410**

15 & 16 Geo. 5, c. 87 (Tithe), s. 1, sub-s. 1; s. 3, sub-ss. 1, 2; s. 4, sub-ss. 1, 2, 4; s. 5, sub-s. 1; s. 6, sub-s. 1: *In re* Leicester's Settled Estates **Morton J. 77**

1926.

16 & 17 Geo. 5, c. 7 (Bankruptcy (Amendment)), s. 1: *In re* Walker **Luxmoore L.J. 974**

16 & 17 Geo. 5, c. 29 (Adoption of Children): *In re* Frame **Simonds J. 700**

1927.

17 & 18 Geo. 5, c. 10 (Finance), ss. 39, 40: *In re* Maclennan - **C. A. 750**

17 & 18 Geo. 5, c. 21 (Moneylenders), s. 17: Transport and General Credit Corporation, Ld. *v.* Morgan - - **Simonds J. 531**

17 & 18 Geo. 5, c. 36 (Landlord and Tenant), s. 3, sub-s. 1: National Electric Theatres, Ld. *v.* Hudgell **Morton J. 553**

1929.

19 & 20 Geo. 5, c. 23 (Companies), s. 75, sub-ss. 1, 2, 3, 5: *In re* Antofagasta (Chili) and Bolivia Railway Co., Ld.'s Trust Deed **Morton J. 732**

—— —— ss. 153, 154: *In re* Oceanic Steam Navigation Co. **Simonds J. 41**

—— —— ss. 170, 264: *In re* North Bucks Furniture Depositories, Ld. - - - **Crossman J. 690**

—— —— s. 214: *In re* Maville Hose, Ld. - - - **Simonds J. 32**

—— —— s. 266: Transport and General Credit Corporation, Ld. *v.* Morgan - - **Simonds J. 531**

STATUTES—*continued.*

19 & 20 Geo. 5, c. 23 (Companies), s. 357: Armour *v.* Liverpool Corporation **Simonds J. 422**

1930.

20 & 21 Geo. 5, c. 39 (Housing): Bond *v.* Norman - - **Simonds J. 847**

1932.

22 & 23 Geo. 5, c. 48 (Town Planning), ss. 34, 48: Att.-Gen. *v.* Barnes Corporation and Ranelagh Club, Ld. - - - **Luxmoore J. 110**

1933.

23 Geo. 5, c. 13 (Foreign Judgments), s. 2, sub-s. 1; ss. 5, 6: *In re* A Judgment Debtor - **C. A. 601**

23 & 24 Geo. 5, c. 51 (Local Government), s. 85: Att.-Gen. *v.* Barnes Corporation and Ranelagh Club, Ld. - - - **Luxmoore J. 110**

1936.

26 Geo. 5 & 1 Edw. 8, c. 33 (Widows', Orphans' and Old Age Contributory Pensions), s. 21, sub-s. 1; s. 32, sub-s. 2 (*f*); Third Schedule: *In re* T. R. M. - **L.JJ. in Lunacy 260**

26 Geo. 5 & 1 Edw. 8, c. 34 (Finance), ss. 24, 25: *In re* White **C. A. 131**

26 Geo. 5 & 1 Edw. 8, c. 43 (Tithe), s. 1; s. 2, sub-s. 1; s. 3, sub-ss. 1, 2; s. 13, sub-ss. 1, 4, 5, 6: *In re* Leicester's Settled Estates **Morton J. 77**

—— —— s. 20, sub-ss. 3, 7, 8, 10, proviso (*a*): Queen Anne's Bounty *v.* Tithe Redemption Commission **Morton J. and C. A. 155**

26 Geo. 5 & 1 Edw. 8, c. 51 (Housing): Att.-Gen. *v.* Finsbury Borough Council - - **Simonds J. 892**

—— —— s. 26: Bond *v.* Norman **Simonds J. 847**

1937.

1 & 2 Geo. 6, c. 26 (Air Raid Precautions), ss. 1, 3, 7: Att.-Gen. *v.* Finsbury Borough Council **Simonds J. 892**

STATUTES OF LIMITATIONS—Tenants in common—One in adverse possession—Co-trustees upon statutory trusts from January 1, 1926 — Fiduciary relationship — Statutes of Limitations inapplicable - - **828**
See Land.

SUPERANNUATION—Contributory fund — Scheme of municipal corporation—Actuarial deficiency in fund — Stoppage by corporation of payment—Scheme intra vires — No contract between employees and the corporation - - - **422**
See CORPORATION.

TENANCY FOR LIFE—Property to be enjoyed by wife during widowhood —Remarriage—Decree of nullity after twelve years—Widow's right to enjoyment of property - **1000**
See WILL **7.**

TENANCY IN COMMON—Adverse possession by one of co-tenants—Co-trustees upon the statutory trusts from January 1, 1926—Fiduciary relationship—Statutes of Limitations inapplicable - - - **828**
See LAND.

TENANT FOR LIFE AND REMAINDERMAN —Annuity made payable out of residue—Settlement under residuary legatee's will—Capital or income—Incidence of annuity - - **905**
See WILL **10.**

—— Settled estates—Tithe rentcharge—Redemption annuity—Annual payments to be borne by tenant for life
See TITHE RENTCHARGE **2.** **77**

—— Will—Wasting property—No trust for sale or conversion—Implied trust for sale with power to postpone indefinitely - - - **200**
See ADMINISTRATION **4.**

TENANTS IN COMMON—Demise of land to tenant for life and on her death to persons in undivided shares—Death of tenant for life—Right of personal representative of testator to have the land vested in him - - **513**
See SETTLEMENT **3.**

TITHE RENTCHARGE—*Arrears—Recovery —Tithe Redemption Commission—Notice—Proceedings—Suspension period—Tithe Act,* 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 43), *s.* 20, *sub-ss.* 3, 7, 8, 10, *proviso* (*a*).

Goldsmiths Co. v. *West Metropolitan Ry. Co.* [1904] 1 K. B. 1 considered.

QUEEN ANNE'S BOUNTY *v.* TITHE REDEMPTION COMMISSION **Morton J. and C. A. 155**

2. —— *Redemption annuity—Settled estate —Agricultural land—Tenant for life and remainderman—Apportionment of annuity—Tithe Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 87), *s.*1, *sub-s.* 1; *s.* 3, *sub-ss.* 1, 2; *s.* 4, *sub-ss.* 1, 2, 4; *s.* 5, *sub-s.* 1; *s.* 6, *sub-s.* 1; *Tithe Act,* 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 43), *s.* 1; *s.* 2, *sub-s.* 1; *s.* 3, *sub-ss.* 1, 2; *s.* 13, *sub-ss.* 1, 4, 5, 6.

In re Poyser [1910] 2 Ch. 444, considered and distinguished. *In re* LEICESTER'S SETTLED ESTATES. COKE AND OTHERS *v.* EARL OF LEICESTER AND OTHERS
Morton J. 77

TOWN PLANNING—Resolutions to prepare scheme—Land privately owned and used as club—Subsequent negotiations for town planning the land—Agreement negotiated by sub-committee and ratified by local authority—Valid agreement - **110**
See LOCAL GOVERNMENT **2.**

TRAMWAY — Undertaking of municipal corporation — Employees' superannuation fund—Contributions by corporation—Actuarial deficiency in fund—Stoppage of payment by corporation—Scheme intra vires—No contract between members of fund and corporation - - **422**
See CORPORATION.

TRUST—Alleged secret trust—Communication by husband to wife—Interrogatories—Widow's absolute privilege as to any such communication **271**
See PRACTICE **2.**
(*But see* PROCEDURE.)

—— —— Interrogatories — Communication by husband to wife—Death of husband—Communication not privileged - - - - **620**
See PROCEDURE.

—— Deed of family arrangement—Three annuities—Trust of balance of income during continuance of one annuity—Annuities not a continuing charge on income - - **277**
See ANNUITY.

—— *Investment clause in will—No exclusion of statutory investments—Powers of trustee —No expression of contrary intention—Trustee Act,* 1893 (56 *&* 57 *Vict. c.* 53), *s.* 1—*Trustee Act,* 1925 (15 *Geo.* 5, *c.* 19), *s.* 69, *sub-s.* 2.

In re Owthwaite [1891] 3 Ch. 494 doubted and distinguished. *In re* WARREN. PUBLIC TRUSTEE *v.* FLETCHER - **Simonds J. 684**

—— Will—Trust for sale and conversion—Power to postpone—Gifts to testator's children—Hotchpot clause—Delay in distribution—Appropriate date for valuation of estate - **985**
See ADMINISTRATION **5.**

TRUST FOR SALE—Land conveyed to joint tenants—Intention to retain as open space—Deed of covenant executed by joint tenants—Restrictions on user—Application by one joint tenant for sale refused
See COVENANT **1.** **217**

TRUST FOR SALE—*continued.*

—— Land devised subject to charges by will of settlor, his son and his grandson—Trust for sale in grandson's will only—No trust for sale of whole property—Compound settlement **51**
See Settlement **1.**

TRUST FUND—Bequest of annuities—Power to resort to capital—Income insufficient—Intention of testator **934**
See Will **11.**

TRUSTEE—Will directing investment in American securities — Power to invest in statutory investments—No expression of contrary intention
See Trust. **684**

—— Power to invest in "stocks, funds and "securities"—Shares in limited companies included - - **858**
See Settlement **4.**

TRUSTEE IN BANKRUPTCY—Election by creditors—Accountant—Member of firm who had acted for debtor—Proposed trustee an accounting party—Valid objection to appointment - - - - - **761**
See Bankruptcy **8.**

ULTRA VIRES — Company's scheme of arrangement—Proposed transfer of undertaking to new company for realization of assets and distribution —No jurisdiction to sanction - **41**
See Company **6.**

—— Metropolitan Borough Council's scheme for making underground shelter disapproved—Grant of building lease of part of clearance area—Lessee to construct underground shelter and relet to council—Intra vires - - - - - **892**
See Local Government **1.**

—— Mortgage—Advance by building society on security of house coupled with collateral security — Enforceable transaction - - - **520**
See Building Society.

UNDERGROUND SHELTER — Metropolitan Borough Council's scheme for making shelter disapproved—Grant of building lease of part of clearance area—Lessee to construct shelter and relet to council—Validity **892**
See Local Government **1.**

VENDOR AND PURCHASER — *Contract —Plan—Mistake on plan—Parties not ad idem—Rectification—Damages.*
In re Daniel [1917] 2 Ch. 405 distinguished.
Wallington *v.* Townsend - **Morton J. 588**

VOLUNTARY SETTLEMENT—Covenant to settle after-acquired property—Refusal of settlor to implement covenant—Trustees directed not to take proceedings to enforce it **329**
See Settlement **5.**

—— Death of settlor within three years—Increased value of settled funds at date of death—Estate duty payable on increased value - - **865**
See Revenue **1.**

—— Settlement by son of interest under marriage settlement—Wife's power to appoint to children — Power exercised in favour of son subsequently—Sum appointed payable to him - - - - **993**
See Power of Appointment **1.**

WASTING PROPERTY—Will—Tenant for life and remainderman—No trust for sale or conversion — Implied trust for sale with power to postpone sale indefinitely - - **200**
See Administration **4.**

WATER—Flooding of mine — Defendants' construction of water tunnel on land of adjoining mineowners—Cesser of defendants' control of tunnel or water flowing through it—Subsequent flooding of plaintiffs' mine—No liability for damages **800**
See Mines and Minerals **1.**

WILL :—

I.—Annuity.

1. —— *Forfeiture on alienation and gift over—Annuitant adjudicated bankrupt in testator's lifetime—Discharge suspended till after testator's death—No income available for payment until after discharge — Forfeiture effective—Bankruptcy Act,* 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *ss.* 28, 38—*Bankruptcy* (*Amendment*) *Act,* 1926 (16 *&* 17 *Geo.* 5, *c.* 7), *s.* 1.
In re Walker. Public Trustee *v.* Walker - - - **Luxmoore L.J. 974**

2. —— *"Free of all duties" and "free "of all deductions whatsoever"—Payable free of income tax.*
In re Shrewsbury Estate Acts [1924] 1 Ch. 315 referred to. *In re* Cowlishaw. Cowlishaw *v.* Cowlishaw - **Bennett J. 654**

3. —— *Construction—Settlement of capital required to produce annuities—Estate insufficient for payment in full—Abatement—Administration—Settled legacies.*
In re Farmer [1938] W. N. 411 and *In re Nicholson* [1938] 3 All E. R. 270 distinguished. *In re* Carew. Channer *v.* Francklyn **Simonds J. 794**

4. —— *Construction—Direction to appropriate fund—Gift over "subject to the payment "of the said annuity"—Estate insufficient—Administration.*

WILL—*continued.*

In re Nicholson. Chadwych-Healey v. *Crawford* [1938] 3 All E.R. 270 distinguished.
In re Farmer. Nightingale *v.* Whybrow
Farwell J. 573

II. Construction.

5. —— *Legacy given free of duty—Legatee domiciled abroad—Incidence of foreign duty—Direction referable to English duty only.*
In re Norbury (Deceased). Norbury *v.* Fahland - - - - **Bennett J. 528**

6. —— *Legacy upon conditions—Condition of adoption of child—Petition for adoption dismissed — Failure of condition — Trust created for maintenance of child—Adoption of Children Act,* 1926 (16 *&* 17 *Geo.* 5, *c.* 29).
In re Frame. Edwards *v.* Taylor
Simonds J. 700

7. —— *Property to be enjoyed by wife during widowhood—Marriage ceremony—Wife as trustee of estate consenting to disposal of property—Marriage not consummated—Decree of nullity twelve years after ceremony—Widow's right to enjoyment of property.*
In re Eaves. Eaves *v.* Eaves
Farwell J. 1000

—— Covenant by husband not to revoke his will—Death of wife—Remarriage of husband—Resulting revocation of will—No breach of covenant **820**
See Deed of Separation.

—— Deed of Family Arrangement—Annuities—Annuitants entitled to clear yearly sums "after deduction of "income tax"—Reliefs which annuitants entitled to—Returnable to the estate - - - - - **750**
See Income Tax.

—— Devise of real estate for benefit of public—Scheme—Assent to devise as to part of land with leave of Court—Desire of trustees of charity to retain land unsold for some years—Jurisdiction of Court to postpone sale - - - - - - **410**
See Charity **1.**

—— Direction to pay all death duties out of the estate—Lapsed shares of residue—Order of application of assets—Statutory order not varied by will - - - - - **238**
See Administration **3.**

—— Gift to society for relief of infirm, sick and aged priests—Trust for advancement of religion — Good charitable bequest - - **22**
See Charity **2.**

—— Land demised to tenant for life and on her death to persons in undivided shares—Death of tenant for life—Right of personal representative of testator to have land vested in him
See Settlement **3.** **513**

WILL—*continued.*

III. Miscellaneous.

8. —— *Legacy—Secret trust—Sum given on verbal trusts communicated to the trustees—Additional sum given on secret trusts by later testamentary disposition—No communication by testator to trustees—Invalidity of later gift.*
The principle laid down in *Blackwell* v. *Blackwell* [1929] A. C. 318 applied.
Decision of Crossman J. (ante p. 580) affirmed. *In re* Colin Cooper. Le Neve-Foster *v.* National Provincial Bank and Others
Crossman J. 580 and C. A. 811

9. —— *Residuary bequest—Gift to child of testator contingent on legatee attaining a certain age—Death of legatee in lifetime of testator before attaining specified age—Lapse—Interest determinable at or before the death of legatee—Wills Act,* 1837 (7 *Will.* 4 *&* 1 *Vict. c.* 26), *s.* 33.
In re Wolson. Wolson *v.* Jackson
Crossman J. 780

—— Residuary estate—Trust for sale and conversion—Power to postpone—Gifts to testator's children—Hotchpot clause—Delay in distribution —Date for valuation of estate **985**
See Administration **5.**

10. —— *Residuary legatee—Annuity out of residue—Settlement under residuary legatee's will—Tenant for life and remainderman—Capital and income—Incidence of annuity.*
In re Perkins [1907] 2 Ch. 596, and *In re Poyser* [1910] 2 Ch. 444, distinguished.
In re Williames (1885) 52 L. T. 41; (1886) 54 L. T. 105, distinguished.
Rule in *Allhusen* v. *Whittell* (1867) L. R. 4 Eq. 295, not applicable.
In re Popham (1914) 111 L. T. 524, followed.
In re Thompson [1908] W. N. 195, distinguished.
In re Darby. Russell *v.* MacGregor
C. A. 905

11. —— *Residue — Trust fund — Income Annuities—Power to resort to capital—Surplus income to charities—Ultimate residue to charities absolutely — Old and young annuitants — Income insufficient — Intention —No valuation of annuities.*
In re Cottrell [1910] 1 Ch. 402; *In re Cox* [1938] Ch. 556; *In re Nicholson* [1938] 3 All E. R. 270, and *In re Farmer* [1939] 1 Ch. 573, considered and distinguished.
In re De Chassiron. Lloyds Bank, Ld. and Others *v.* Sharpe **Morton J. 934**

12. —— *Revenue—Annuity "free of income tax at current rate for time being "deductible at source"—Reliefs and allowances.*
In re Pettit. Le Fevre v. *Pettit* [1922] 2 Ch. 765, and *In re Kingcome. Hickley* v. *Kingcome* [1936] Ch. 566, followed.
In re Eves. Midland Bank Executor and Trustee Company, Ld. *v.* Eves
Morton J. 969

WILL—*continued.*

13. —— *Rule against perpetuities—Residuary gift—Validity—Rule against double portions—Trustees' power to appoint residuary estate among testator's children.*
Decision of Simonds J. ([1938] Ch. 581) reversed. *In re* VAUX. NICHOLSON *v.* VAUX **C. A. 465**

14. —— *"Securities" — Whether stock and shares in companies and Government stocks included—"Money."*
Dictum of Lord Cave in *Singer* v. *Williams* [1921] 1 A. C. 41, 49, followed.
In re SMITHERS. WATTS *v.* SMITHERS **Crossman J. 1015**

15. —— *Settlement—Conversion—Investments—representing proceeds of sale of settled realty — Will in French form not executed in manner required by English law—Will effective under Lord Kingsdown's Act to pass personal estate—Will inoperative to pass the investments —Wills Act, 1861 (Lord Kingsdown's Act) (24 & 25 Vict. c. 114), s. 1—Settled Land Act, 1925 (15 Geo. 5, c. 18), s. 75, sub-s. 5.*
In re CARTWRIGHT. CARTWRIGHT *v.* SMITH **Bennett J. and C. A. 90**

16. —— —— *Life annuity secured on real and leasehold property—Direction to accumulate surplus income—Gift of accumulations on death of annuitant—Power of sale with consent of annuitant—Death of testator before 1926—End of period of accumulations after 1926—Destination of income of accumulations—Settled Land Act, 1925 (15 Geo. 5, c. 18), ss. 5, 13; s. 23, sub-s. 1; ss. 75, 108, 109—Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 164.*
In re JEFFERYS. FINCH *v.* MARTIN **Farwell J. 205**

17. —— *Shares of residue—Advancement of children by testator—Settlement of advances—Hotchpot clause—Rule for ascertaining capital and income to be brought into hotchpot—General rule of administration.*
In re Rees (1881) 17 Ch. D. 701 and *In re Poyser* [1908] 2 Ch. 128 followed and applied.
In re Hargreaves (1903) 88 L. T. 100 distinguished.
In re Mansel [1930] 1 Ch. 352 not followed.
In re WILLS. DULVERTON *v.* MACLEOD **Simonds J. 705**

WILL—*continued.*

—— Investment clause—Direction to invest upon American securities—No exclusion of statutory investments **684**
See TRUST.

WINDING-UP—Company—Unpaid rates — Petition by Local Authority to wind up company - - **690**
See LOCAL AUTHORITY.

—— Insurance company—Various classes of business carried on—Assets how distributable - - - **553**
See COMPANY **5.**

—— Order on director of another company to attend for examination and produce debentures and documents —Order premature and oppressive **32**
See COMPANY **7.**

WORDS :—

—— "After deduction of income tax": *In re* MACLENNAN - **C. A. 750**

—— "Creditors in the bankruptcy": *In re* A DEBTOR - - - **C. A. 489**

—— "Forthwith": *In re* MUSCOVITCH **C. A. 694**

—— "Free of all duties": *In re* COWLISHAW - - **Bennett J. 654**

—— "Free of income tax at current rate "for time being deductible at "source": *In re* EVES **Morton J. 969**

—— "Improvement": NATIONAL ELECTRIC THEATRES, LD. *v.* HUDGELL **Morton J. 553**

—— "Money": *In re* SMITHERS **Crossman J. 1015**

—— "Proceeding to trial": SUPERMA, LD. *v.* TENCONI - **Morton J. 724**

—— "School or seminary": LAWRENCE *v.* SOUTH COUNTY FREEHOLDS, LD. **Simonds J. 656**

—— "Securities": *In re* SMITHERS **Crossman J. 1015**

—— "Stocks, funds and securities": *In re* McEACHARN'S SETTLEMENT TRUSTS - - - **Bennett J. 858**

—— "To be paid free of all deductions": *In re* COWLISHAW **Bennett J. 654**

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Part I.—January 4.

TABLE OF CASES.

CHANCERY DIVISION. PAGE

Attorney-General *v.* Barnes Corporation and Ranelagh Club, Ld. .. 110
Cartwright, *In re.* Cartwright *v.* Smith .. .. C. A. 90
Dickinson's Settlements, *In re.* Bickersteth *v.* Dickinson 27
Forster, *In re.* Gellatly *v.* Palmer 22
Leicester's Settled Estates, *In re.* Coke *v.* Earl of Leicester 77
Maville Hose, Ld., *In re* 32
Nicholson's Settlement, *In re.* Molony *v.* Nicholson .. .. C. A. 11
Oceanic Steam Navigation Co., *In re* 41
Sharpe's Deed of Release, *In re.* Sharpe and Fox *v.* Gullick 51
Zetland (Marquess) *v.* Driver .. .. C. A. 1

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